Supreme Court, U.S.
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No. 06-576

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In the Supreme Court of the United States

JES PROPERTIES, INC.
d/b/a CYPRESS TRAILS FARM,
a Florida corporation, and
MICHAEL W. GALLAGHER,

Plaintiffs,

vs.

USA EQUESTRIAN TRUST, INC., f/k/a USA EQUESTRIAN, INC. (formerly the American Horse Show Association), UNITED STATES EQUESTRIAN FEDERATION, INC., DAVE BURTON a/k/a DAVE BURTON, SR. a/k/a DAVE E. BURTON a/k/a DAVID E. BURTON, SR., BURTONS AND SONS, INC., DAVID BURTON a/k/a DAVID BURTON ,JR., a/k/a DAVID E. BURTON a/k/a DAVID E. BURTON, JR., LITTLEWOOD FENCES, INC., LTD., KERNAN HODGES a/k/a MRS. EUGENE R. MISCHE, STADIUM JUMPING, INC., THOMAS E. STRUZZIERI, HORSE SHOWS IN THE SUN, INC., LINDA S. ALDRICH, AND FOX LEA FARM, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBIN S. TRUPP
ARNSTEIN & LEHR LLP
1100 North Florida Avenue
Tampa, Florida 33606
(813) 254-1400

ARTHUR L. KLEIN
Counsel of Record
ROBERT D. BUTTERS
JOHN C. ROPIEQUET
JASON B. HIRSH
ARNSTEIN & LEHR LLP
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100

Midwest Law Printing Company/Photex — Chicago — (312) 431-0185

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit may, in stated conflict with the decision of the United States Court of Appeals for the Second Circuit in *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005), *cert. pending*, No. 05-1157, rule that a preclusive scheduling rule (the "Mileage Rule") which has conceded anti-competitive effects, adopted by a National Governing Body under the auspices of the Ted Stevens Olympic and Amateur Sports Act of 1978, 36 U.S.C. § 220501 *et seq.* (the "ASA"), is impliedly immune from all antitrust scrutiny under Section 1 of the Sherman Act, 15 U.S.C. § 1, without any examination or analysis of whether the Rule is necessary to effectuate Congress' intent in enacting the ASA.

2. Whether decisions of this Court, including *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1246 (1963), *Gordon v. New York Stock Exchange*, 422 U.S. 659, 95 S. Ct. 2598 (1975), and *United States v. Nat'l Ass'n of Security Dealers*, 422 U.S. 694, 95 S. Ct. 2427 (1975), preclude the holding of the United States Court of Appeals for the Eleventh Circuit that any and all rules promulgated by an NGB under the ASA are impliedly exempt from antitrust scrutiny as a matter of law, no matter their admitted anti-competitive effects.

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE

Petitioner JES Properties, Inc. d/b/a Cypress Trails Farms is a non-governmental corporation. Pursuant to Supreme Court Rule 29.6, Petitioner states that there is no parent corporation and no publicly held company owns 10% or more of the corporation's stock. Petitioner Michael W. Gallagher is an individual.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, JES Properties, Inc., d/b/a Cypress Trails Farm and Michael W. Gallagher, respectfully request that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit entered on August 2, 2006. The Eleventh Circuit affirmed a decision of the United States District Court for the Middle District of Florida, which granted Defendants' motion for summary judgment.

OPINION BELOW

The opinion of the Eleventh Circuit is officially reported at *JES Properties, Inc. v. U.S.A. Equestrian, Inc.*, 458 F.3d 1224 (11th Cir. 2006). The District Court's order granting defendants' motion for summary judgment is not officially reported but is cited at 2006 WL 1126665 (M.D. Fla. 2005).

JURISDICTION OF THIS COURT

Judgment was entered by the Eleventh Circuit on August 2, 2006. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners filed their initial complaint in August, 2002, alleging claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Florida law. (R.1)[1] The complaint was subsequently amended, the third amendment having been filed in December, 2004. (R.258) The District Court granted summary judgment to all remaining defendants in May, 2005. (A.56) The Eleventh Circuit affirmed. (A.16)

The gravamen of Petitioners' complaint is a Sherman Act Section 1 challenge to the Mileage Rule, a restrictive scheduling rule governing the most important competitions for the key equestrian categories (hunter and

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[1] "R. indicates a reference to the Record before the Eleventh Circuit, including the district court document docket number, which may have subparts, plus page and paragraph numbers as appropriate, as in "R.317-14/7-8/15-16," indicating docket number 317, subpart 14, pages 7-8, paragraphs 15-16. "A." indicates a reference to the Appendix.

jumper). (Rule 214.7)[2] (R. 317-14/8/17; R.317-18/4-5/20) The Rule was enacted by defendant United States Equestrian Federation (the "USEF"), the National Governing Body (the "NGB") for equestrian sport designated by the United States Olympic Committee (the "USOC")[3] pursuant to the Ted Stevens Olympic and Amateur Sports Act of 1978, 36 U.S.C. § 220501 *et seq.* (the "ASA").

The USEF is a private membership organization made up of individuals, including persons who own and ride horses ("riders") and for-profit promoters who stage equestrian competitions ("horse shows"). The USEF rules allow it to designate certain horse shows as "Recognized Competitions." Recognized Competitions in the hunter and jumper categories are rated based upon the benefits conferred upon successful participating riders. Such benefits include the points a few highly successful jumper riders may earn towards selection for the United States Olympic Equestrian Team. (R.317-9/5-6; R.317-14/7-8/15; R.317-18/4/18)

The highest rated hunter and jumper Recognized Competitions are rated "A" or "AA" ("A-Rated Shows"). Promoters of A-Rated Shows may award the maximum amount of points to successful hunter competitors and prize money in excess of $10,000 to successful jumper competitors. (R.317-14/8/17; R.317-15/2-3/7; R.317-18/4-

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[2] A complete set of the relevant Rules as they existed prior to the 2005 amendments was lodged with the district court as an exhibit to R.288. These are cited as "Rule." A complete set of the relevant Rules as amended including Rules effective May 1, 2006 for the 2006 competition year is at R.344-2/1-8. These are cited as "Am. Rule."

[3] There are some 39 National Governing Bodies, one for each Olympic sport, according to the USOC's official website. *See* http://www.usolympicteam.com/19116_18922.htm.

5/20) Success in A-Rated Shows can also qualify riders for invitations to more prestigious national competitions. (R.317-9/5-6; R.317-14/8/17; R.317-18/4-5/20) While those few jumper riders who aspire to membership on the Olympic team typically compete in A-Rated Shows, most of the attendees at A-Rated Shows are riders whose primary goal is to improve the rankings of their horses to increase their value for resale or breeding or people who simply enjoy attending or competing in the shows. (R.317-9/5-6; R.317-14/7-8/15; R.317-18/4/18)

Both Petitioners and the non-USEF Defendants (the "Promoter Defendants") are for-profit promoters of horse shows, including A-Rated Shows. Because of its favorable climate, Florida is the site of most A-Rated Shows conducted in the United States during the Winter Season of December through March. (R.317-14/6/13; R.317-18/3-4/17) Promoters like the Promoter Defendants benefit economically from holding A-Rated Shows in several ways. Holding an A-Rated Show rather than a show with a lower rating enables promoters to charge the highest entrant and attendee fees, obtain the largest corporate sponsorship fees, and to sell ancillary services (such as horse stall rentals, bedding, feed, grooming supplies, and the sale of food and beverages to exhibitors and spectators) at the highest rates. Promoters also profit from developing real estate adjacent to horse show venues as residences for riders who desire to remain in Florida throughout the Winter Season. (R.317-9/7-8; R.317-14/8/16; R.317-18/4/19) Real estate near venues for A-Rated Shows is worth more than real estate near venues for lower rated shows. (R.317-9/7-8; R.317-14/8/16; R.317-18/4/19)

Under the USEF's Mileage Rule, promoters of A-Rated Shows who held shows in the previous year ("incumbent promoters") have a permanent veto power over the ability of other promoters to conduct competitive A-Rated Shows in subsequent years on the same date and within a 250-

mile radius of the incumbents' shows.[4] (Rule 214.7; R.317-14/8-9/18; R.317-18/5/21) Under other USEF rules, incumbent promoters also receive automatic renewals of their dates for A-Rated Shows in subsequent years as long as they seek renewal on a timely basis.[5] (Rule 212.1) However, incumbent promoters may, in their sole discretion, grant one-year Mileage Rule "waivers" to other promoters. (Rule 214.7) A Mileage Rule waiver permits a competing promoter to hold an A-Rated Show in a particular year within the 250-mile radius of exclusion at the same time as the incumbent's show, so long as the competitive show is no closer than 10 miles from the incumbent promoter's show. (Rule 214.7; R.317-14/8-9/18; R.317-18/5/21) Consequently, the incumbent promoters, not the NGB, determine who else may hold A-Rated Shows and when the shows may be held.[6]

The Promoter Defendants are incumbents who have, for decades, controlled each and every date for A-Rated Shows

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[4] As a result of earlier antitrust litigation, the Mileage Rule applicable in certain Northeastern States prohibits competition only within a 125-mile radius. (Rule 214.1; R.317-15/3/8) *See Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n*, 609 F. Supp. 677 (S.D.N.Y. 1985).

[5] A modification to the USEF's rules effective in 2006, long after Petitioners' suit was filed, required incumbent promoters for the first time to also meet certain minimum quality requirements to receive renewals. (Am. Rule 218)

[6] Another modification to the Mileage Rule effective in 2006 involved the USEF for the first time in decisions whether to grant waivers, but only an incumbent promoter has the power to initially approve a waiver request. If the incumbent promoter declines to grant a waiver allowing a competing promoter to hold an A-Rated Show, the USEF has no power to reverse that decision. (Am. Rule 214.7)

during the Winter Season in Florida. (R.317-6; R.317-14/8-9/18; R.317-18/5/21) While this small cartel of incumbent promoters has regularly granted waivers to each other (including some that automatically renew every year by written agreement), they have steadfastly refused to grant waivers to any other horse show promoters, including Petitioners, to hold competing shows within 250 miles of their shows. (R.317-14/10-13/22-23; R.317-18/2-3/12-13) This 500-mile wide zone of exclusion has effectively put the entire State of Florida off limits to any non-incumbent promoter who attempts to enter the market to stage an A-Rated Show. (R.317-5; R.317-14/8-9/18; 317-18/5/21) Thus, Petitioners have been permanently precluded from holding A-Rated Shows—the highest rated and most lucrative—during the key Winter Season in Florida.

On May 9, 2005, the District Court granted summary judgment to Defendants, holding principally that the Mileage Rule, the anti-competitive effects of which were undisputed, was impliedly exempt from antitrust scrutiny as a matter of law without reference to, or analysis of, whether the Rule was necessary to effectuate Congress' intent in enacting the ASA. (A.36) In so holding, the District Court did not discuss, or even cite, this Court's landmark decision in *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1 (1963), which Plaintiffs discussed at length, even though *Silver* clearly requires such analysis.[7]

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[7] The District Court also held that plaintiffs lacked antitrust standing, that they failed to prove a "conspiracy," that *per se* analysis did not apply and that there was no violation of the Rule of Reason, notwithstanding Defendants' concession of anti-competitive effect. (A.37; A.41; A.46; A.50) However, the Eleventh Circuit did not reach those issues, affirming only on the implied immunity issue.

On appeal to the Eleventh Circuit, Petitioners also discussed the then-recent decision of the United States Court of Appeals for the Second Circuit in *Billing v. Credit Suisse First Boston, Ltd.*, 426 F.3d 130 (2d Cir. 2005), *cert. pending*, No. 05-1157, which was issued during the pendency of the appeal. In particular, Petitioners extensively discussed *Billing's* holding, as mandated by this Court's decisions in *Silver, Gordon v. New York Stock Exchange*, 422 U.S. 659, 95 S. Ct. 2598 (1975), and *United States v. Nat'l Ass'n of Security Dealers*, 422 U.S. 694, 95 S. Ct. 2427 (1975) (*NASD*), that a determination whether a federal regulatory statute confers implied antitrust immunity requires a detailed and extensive examination of the congressional intent underlying the statute, and whether that intent will be thwarted if the rule or conduct at issue is not immunized from the federal antitrust laws.

In affirming the District Court's summary judgment for Defendants, the Eleventh Circuit specifically declined to follow *Billing*, and therefore the decisions of this Court, holding instead that any and all rules adopted by an NGB which purport to deal with subject matters that the ASA authorizes NGBs to regulate are impliedly immune from antitrust scrutiny as a matter of law, without regard to whether the particular rule is in fact necessary to achieve Congress' intent. According to the Eleventh Circuit, all that is required is that the rule at issue be within a general category of rules that the ASA authorizes NGBs to adopt. 458 F.3d at 1230-31. Under this decision, the courts need not analyze whether a rule which otherwise violates the antitrust laws, but which is purportedly adopted pursuant to statutory authority, is really necessary to make the statute work in order to immunize that rule from antitrust scrutiny.

The Eleventh Circuit's ruling stands in sharp conflict not only with the Second Circuit's decision in *Billing*,

but also with the well-settled decisions of this Court concerning implied antitrust immunity.

REASONS FOR GRANTING THE WRIT

In holding that there is blanket immunity from the antitrust laws for a rule adopted pursuant to a federal regulatory statute, without examination or analysis of whether the specific rule, as adopted and enforced, is necessary to effectuate Congress' intent in enacting the regulatory statute, the Eleventh Circuit specifically refused to follow the contrary holding of the Second Circuit in *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005). The Eleventh Circuit has thus created not only a conflict between the Circuits but has also has issued a ruling contrary to the settled decisions of this Court.

As discussed above, the Eleventh Circuit accorded blanket antitrust immunity to the Mileage Rule adopted by the USEF as the NGB for equestrian sport under the auspices of the ASA. The court so ruled notwithstanding Defendants' concession (and the District Court's presumption) that the Rule had anti-competitive effects (A.46-47) and notwithstanding that the Rule permits the Promoter Defendants, rather than the NGB itself, to autonomously control exclusion of new entrants into the relevant market (staging A-Rated Shows during the Winter Season in Florida) in plain violation of the ASA's statutory mandate that NGBs are not to delegate such determinations and control over scheduling. *See* 36 U.S.C. § 220522 (a)(5)(A)-(C) (formerly 36 U.S.C. § 391(b)(4)), quoted in *Behagen v. Amateur Basketball Ass'n of the United States*, 884 F.2d 524, 528 (10th Cir. 1989), *cert. denied*, 495 U.S.

918 (1990), cited and relied upon by the Eleventh Circuit. 458 F.3d at 1229.

In *Silver*, 373 U.S. at 357, 83 S. Ct. at 1257, this Court stated the guiding principles for determining whether immunity from antitrust liability will be implied from another federal regulatory law which contains no express exemption from the antitrust laws:

> [A]ny repealer of the antitrust laws must be discerned as a matter of implication, and "it is a cardinal principle of construction that repeals by implication are not favored." [citations omitted]. *Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.* This is the guiding principle to reconciliation of the two statutory schemes. (emphasis supplied)

This Court subsequently addressed implied antitrust immunity in several cases, including *Gordon* and *NASD*. The Second Circuit likewise addressed this subject in several other cases, culminating in its comprehensive decision in *Billing*, which reviewed all of its and this Court's decisions and restated the rules concerning implied antitrust immunity. All of these cases follow this Court's seminal decision in *Silver*.

In contrast to the Second Circuit's approach to the implied antitrust immunity issue in *Billing*, the Eleventh Circuit only cited *Behagen* and *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198 (5th Cir. 2000), as support for its holding that every rule adopted by an NGB has blanket immunity from the antitrust laws without any examination or analysis of the rule's effects to determine whether the rule is necessary to effectuate congressional intent embodied in the ASA. 458 F.3d at 1231-33. But neither case comes close to standing for such

a broad proposition, in derogation of the principles first laid down in *Silver*.

In *Behagen*, the Tenth Circuit clearly examined the substance of the rule before it, which retained for the NGB itself the sole power to determine who was eligible to play amateur basketball. The court assessed the rule's reasonability and necessity to make the ASA work, as mandated by *Silver*, which the *Behagen* court specifically cited. The court used the term "monolithic control" not to indicate that the actions of NGBs are exempt from the antitrust laws, as the Eleventh Circuit seemed to presume, 458 F.3d at 1230-31, but rather to denote that under the rule in question, the NBG, and only the NGB, could exercise authority to determine player eligibility. 884 F.2d at 527-30.

In *Eleven Line*, the Fifth Circuit held that the rule before it, which governed the facilities where youth soccer could be played and which was not enacted by the NGB but by a state affiliate, was invalid. In reaching its conclusion, the *Eleven Line* court, like the *Behagen* court, carefully considered whether the rule in question was necessary to the conduct of the sport, as *Silver* requires, and therefore impliedly immune from the antitrust laws. 213 F.3d at 204-05.

In *Billing*, the Second Circuit restated, as this Court has uniformly held, that whenever implied immunity is asserted to defend an antitrust attack upon conduct permitted by a rule promulgated pursuant to a federal regulatory statute, the rule at issue must be scrutinized and analyzed with care to determine its reasonability and whether antitrust immunity for the conduct at issue is essential to enable Congress' intent in enacting the regulatory statute to be achieved. 426 F.3d at 164-65. However, the Eleventh Circuit simply dismissed *Billing* as inapposite, stating that "[r]egardless of whether *Billing*

would require a more searching scrutiny of the Mileage Rule, this Court follows the more closely analogous holdings in *Behagen* and *Eleven Line*." 458 F.3d at 1233.

But neither *Behagen*, *Eleven Line* nor any other case supports the Eleventh Circuit's expansive view that the ASA exempts all rules promulgated by NGBs from scrutiny under the antitrust laws on a blanket basis, regardless of the rules' anti-competitive effects. Nor do those cases support an antitrust exemption where, as here, the NGB has failed to exercise "monolithic control" over the subject matter of a rule, instead ceding to self-interested private parties like the Promoter Defendants a significant element of control.[8]

As *Silver*, *Gordon*, and *NASD* make clear, and as *Billing* confirmed, this is not the law and it never has been. Quoting from the opinion of Justice Kennedy (then Circuit Judge) in *Phonetele, Inc. v. American Telephone & Telegraph Co.*, 664 F.2d 716, 727 (9th Cir. 1981), the Second Circuit observed, 426 F.3d at 147 n. 20, that:

> One point must be plain: we must recognize there is no simplistic and mechanically universal doctrine of implied antitrust immunity; each of the Supreme Court's cases is decisively shaped by considerations of the special aspects of the regulated industry involved.

While it is, of course, not appropriate to resolve at this juncture whether the Mileage Rule is unreasonable or unnecessary to make the ASA work, there are very strong arguments to that effect. But those arguments were improperly ignored by the District Court and again by the Eleventh Circuit, which deliberately chose not even to

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[8] As discussed above, if an incumbent promoter decides, in its sole discretion, to grant a Mileage Rule waiver, the 250-mile radius of exclusion is reduced to 10 miles. (Rule 214.7)

discuss, let alone analyze, the necessity for the Rule, holding instead that it—and all other rules adopted by an NGB—have blanket immunity from antitrust analysis.

The Eleventh Circuit's decision, if allowed to stand in direct conflict with *Billing* and the decisions of this Court, will surely undermine Congress' intent in enacting the federal antitrust laws over a century ago. These laws represent Congress' judgment that free competition is the most appropriate method of managing the nation's economy. Now, according to the Eleventh Circuit, courts should simply presume that Congress intended the nation's bedrock competition policy to give way whenever a regulatory body, whether governmental or private, adopts a rule that is arguably within its statutory authority.

The Eleventh Circuit's decision is contrary not only to *Billing*, which currently pends before this Court on Petition for Writ of Certiorari, and the many Circuit Court of Appeals cases cited in *Billing*, it is also contrary to numerous decisions by this Court, including *Silver*, *Gordon*, and *NASD*. Petitioners respectfully submit that the Eleventh Circuit's decision directly contradicts all settled law on implied antitrust immunity and that it should be reversed.

CONCLUSION

For each and all the foregoing reasons, Petitioners respectfully pray that this Court issue a Writ of Certiorari and thereafter reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

JES PROPERTIES, INC. and
MICHAEL W. GALLAGHER

ARTHUR L. KLEIN
ROBERT D. BUTTERS
JOHN L. ROPIEQUET
JASON B. HIRSH
ARNSTEIN & LEHR LLP
120 S. Riverside Plaza, Suite 1200
Chicago, Illinois 60606-3910
(312) 876-7100

ROBIN S. TRUPP
ARNSTEIN & LEHR LLP
1100 N. Florida Avenue
Tampa, Florida 33606
(813) 254-1400

APPENDIX

**United States Court of Appeals,
Eleventh Circuit.**

JES PROPERTIES, INC., a Florida corporation, d.b.a. Cypress Trails Farm, Michael W. Gallagher,
Plaintiffs-Appellants,
v.
USA EQUESTRIAN, INC., f.k.a. American Horse Show Assoc., et al., Dave Burton, a.k.a. Dave Burton, Sr., a.k.a. Dave E. Burton, a.k.a. Dave E. Burton, Sr., Burton & Sons, Inc., Littlewood Fences, Inc., David Burton, a.k.a. David Burton, Jr., a.k.a. David E. Burton, a.k.a. David E. Burton, Jr., United States Equestrian Federation, Inc., Stadium Jumping, Inc., Eugene R. Mische, et al.,
Defendants-Appellees.

No. 05-13255.

Aug. 2, 2006.

Appeal from the United States District Court for the Middle District of Florida.

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Before EDMONDSON, Chief Judge, and BIRCH and ALARCÓN[1], Circuit Judges.

ALARCÓN, Circuit Judge:

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[1] Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

JES Properties, Inc. ("JES") and Michael W. Gallagher appeal from the District Court's entry of summary judgment in favor of United States Equestrian Federation ("USEF"); Thomas E. Struzzieri, *1226 Horse Shows in the Sun, Inc., and Rose View Stables, Ltd (collectively, "HITS"); Eugene R. Mische and Stadium Jumping, Inc. (collectively, "SJI"); and David E. Burton, Sr. David E. Burton, Jr., Burton and Sons, Inc., and Littlewood Fences, Inc. (collectively, the "Burtons") (HITS, SJI and the Burtons are referred to collectively as the "Promoter Defendants"). The District Court concluded that JES and Mr. Gallagher had failed to raise a triable issue of fact regarding their claim that the USEF and the Promoter Defendants violated Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. We affirm.

Since 1917, the United States Equestrian Federation ("USEF") and its predecessor the USA Equestrian, Inc. ("USAE") have governed the sport of amateur equestrianism in the United States. The rules that govern all American equestrian competitions were promulgated originally by the USAE. In June 2004, the United States Olympic Committee ("USOC"), pursuant to the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 *et seq.* ("ASA"), officially appointed the USEF as the sole national governing body for the sport ("NGB"). When appointed as the NGB, the USEF's Board of Directors adopted the same rules promoted by USAE, but with some changes effective in 2006.

The USEF consists of private individuals such as professional and amateur rider-athletes, trainers, judges, horse owners and officials; non-profit amateur sports organizations such as the North Florida Hunter and Jumper Association, Inc.; and promoters who profit financially by holding equestrian competitions. The USEF maintains a fifty-four member Board of Directors to promulgate the rules of the sport. The Board of Directors

of the USEF contains ten members of the hunter/jumper community and no less than twenty percent of the voting power is allocated to "active equestrian athletes." An "active athlete" is one who is engaged in equestrian competition or has represented the United States at an amateur international competition within the past ten years.

The NGB rules sanction certain equestrian competitions called "recognized competitions," which provide particular benefits to riders and promoters. Recognized competitions allow riders to collect points from wins. Wins lead to invitations to more prestigious competitions. In addition, recognized competitions award a total prize money amount of $10,000 or more for the "jumper" section of the competition.

Recognized competitions that are considered "A" or "AA-rated" are the highest rated competitions. They award the most points and in theory attract the best riders. In order to represent the United States at an international level, including the Olympic Games, athletes must compete in USEF-sanctioned competitions and typically excel in the A or AA-rated competitions.

All recognized competitions are subject to General Rule 214.7 ("Mileage Rule"), which was promulgated in 1975 by USAE (known at that time as the American Horse Shows Association) and adopted by the USEF.[2] The Mileage Rule

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[2] The Mileage Rule provides:

New competitions offering "A" rated hunter or jumper divisions or sections will not be recognized on dates conflicting with those of any other Recognized Competition within the applicable distance specified by this rule which offers A rated hunter or jumper divisions or sections, regardless of class scheduling . . .. The mileage restrictions . . . will not prevent two Hunter/Jumper competitions from being approved if the two competitions have

(continued...)

requires *1227 that any A-rated recognized competitions held on the same date must be held at least 250 miles away from each other. This is true for all but some Northeastern states, which are subject to a 125-mile radius distance for A-rated competitions. The required distance diminishes as the rating decreases. Unrated or local competitions on the same date can be held within fifty miles of each other.

Under the Mileage Rule, an A-rated competition that was held on a certain date in the previous year receives priority. A promoter may nevertheless obtain USEF recognition if all "affected competition managements" agree in writing to permit the additional recognized competition. This written agreement is referred to as a "waiver." Stricter still for hunter/jumper competitions, the USEF requires a waiver for each year and an additional competition can never be closer than ten miles from an established one. However, a promoter may hold an A-rated competition elsewhere or on a different date without obtaining a waiver. Similarly, a promoter may hold B- or C-level competitions. The purpose of the Mileage Rule appears to be twofold. First, it aims to concentrate elite riders into fewer competitions in order to yield the most competitive international equestrian team possible. Second, the rule intends to promote equestrianism nationwide by forcing promoters to hold recognized competitions in more diverse locations.

JES and Mr. Gallagher are among those USEF members who gain financially from promoting equestrian competitions. The Promoter Defendants also hold competitions for

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[2] (...continued)
different competition managements and the competition with priority gives written permission, to be renewed annually, and the mileage distance between competitions is at least 10 miles.

profit. JES, Mr. Gallagher, and the Promoter Defendants have conducted USEF sanctioned competitions throughout the state of Florida. JES, Mr. Gallagher, HITS, and the Burtons have also held unrecognized competitions in Florida.

In Florida, the weather is desirable for equestrian competition in the winter months, December through March. Because of the weather, the most lucrative and profitable winter season competitions occur in Florida. For the winter seasons of 2003-2004, 2004-2005, and 2005-2006, the Promoter Defendants planned every weekend to hold A-rated competitions in Florida. The Promoter Defendants secured these dates and facilities in Florida before JES and Mr. Gallagher. Due to the Mileage Rule, JES and Mr. Gallagher were unable to secure a date between December and March on which to hold A or AA-rated competitions in Florida. As provided by the rule, JES and Mr. Gallagher requested waivers from the "affected competition managements," the Promoter Defendants. The Promoter Defendants denied JES's and Mr. Gallagher's requests for waivers.

In 1982, HITS and SJI granted each other waivers that have been renewed each subsequent year. The reciprocal agreement permitted each promoter to hold USEF sanctioned A-rated competitions within the 250 mile restriction.

JES and Mr. Gallagher filed a complaint challenging the Mileage Rule as a violation of the Sherman Antitrust Act. They also alleged that the Promoter Defendants committed antitrust violations by granting each other waivers while refusing to grant waivers to JES and Mr. Gallagher. The District Court entered summary judgment in favor of the USEF and the Promoter Defendants. It concluded that (1) each defendant was entitled to implied immunity from

antitrust liability; (2) JES and Mr. Gallagher lacked antitrust standing; (3) JES and Mr. Gallagher failed to present evidence of concerted action; and (4) the Rule of Reason applied to the USEF's and the Promoter Defendants' actions, and their actions were not an unreasonable *1228 restraint of trade. JES and Mr. Gallagher timely appeal each of those conclusions. We conclude that the USEF and the Promoter Defendants are entitled to implied immunity. We address standing briefly, but we do not reach the other issues raised by JES and Mr. Gallagher.

II

A.

JES and Mr. Gallagher argue that the District Court erred in its determination that they lacked antitrust standing. Whether a plaintiff has standing to prosecute an antitrust claim is a question of law. *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir.1991).* "Standing in an antitrust case involves more than the 'case or controversy' requirement that drives constitutional standing." *Id.* (citing *Flast v. Cohen,* 392 U.S. 83, 94-101, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)). Rather, antitrust standing "involves an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." *Id.*

Because we conclude that the USEF and the Promoter Defendants are immune from antitrust liability, we need not determine whether JES and Mr. Gallagher have standing. *Levine v. Central Fla. Med. Affiliates, Inc.,* 72 F.3d 1538, 1545 (11th Cir.1996). In *Levine,* this Court noted:

> When a court concludes that no [antitrust] violation has occurred, it has no occasion to consider standing . . . . An increasing number of courts, unfortunately, deny standing when they really mean that no violation has occurred. In particular, the antitrust injury element of standing demands that the plaintiff's alleged injury result from the threat to competition that underlies the alleged violation. A court seeing no threat to competition in a rule-of-reason case may then deny that the plaintiff has suffered antitrust injury and dismiss the suit for lack of standing. Such a ruling would be erroneous, for the absence of any threat to competition means that no violation has occurred and that even suit by the government—which enjoys automatic standing—must be dismissed.

Id. (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 360f, at 202-03 (rev. ed.1995) (footnotes omitted)). This Court has previously "ruled on the merits of an antitrust claim without ever deciding whether the plaintiff has antitrust standing." *Id.*

We see no difference between the example offered in *Levine*—a court seeing no threat to competition in a rule-of-reason case—and our conclusion in this case that the USEF and the Promoter Defendants are immune from antitrust liability because the ASA impliedly repeals the antitrust laws to the extent the USEF was acting pursuant to authority conveyed by the ASA. A defendant is entitled to implied immunity when its actions are necessary for the effective operation of a law enacted by Congress. *See infra*, Part IB; *Silver v. New York Stock Exch.*, 373 U.S. 341, 357, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963). No party is able to establish an injury to competition under such circumstances because implied repeal of the antitrust laws represents a policy decision by Congress to tolerate that level of threat to competition. *See id.* at 359 (concluding

that New York Stock Exchange regulation did not impliedly repeal antitrust laws when, *inter alia,* it produced "competitive injury . . . when the imposition of such injury [was] not within the scope of the great purposes of the Securities Exchange Act."). We therefore turn to the merits of JES and Mr. Gallagher' antitrust claim.

B.

JES and Mr. Gallagher next argue that the District Court erred in concluding that the ASA impliedly repeals the antitrust *1229 laws, thus giving the USEF and the Promoter Defendants immunity from antitrust liability. A district court's decision to grant summary judgment is reviewed *de novo. Holloman v. Mail-Well Corp.,* 443 F.3d 832, 836 (11th Cir.2006). Summary judgment is appropriate if the moving party demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

In *Silver,* the Supreme Court held that under certain circumstances, a defendant is immune from antitrust liability because his or her actions are permitted by overriding federal law. *Silver,* 373 U.S. at 357, 83 S.Ct. 1246. "Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon v. New York Stock Exch., Inc.,* 422 U.S. 659, 682, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975) (quoting *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350- 51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963)). "Repeal is to be regarded as implied only if necessary to make [another federal law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of . . . two statutory schemes." *Silver,* 373 U.S. at 357, 83 S.Ct. 1246.

In this case, the USEF and the Promoter Defendants argue that the ASA impliedly repeals the antitrust laws. The ASA was enacted "to correct the disorganization and serious factional disputes that seemed to plague amateur sports in the United States." *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 483 U.S. 522, 544, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987) (citations and internal quotations omitted). Under the ASA, the United States Olympic Commission ("USOC") is authorized to recognize one national governing body ("NGB") for each sport included in the program of the Olympic games.

> The NGB must satisfy a number of requirements, including the ability to "demonstrate[ ] that it is autonomous in the governance of its sport, in that it independently determines and controls all matters central to such governance, does not delegate such determination and control, and is free from outside restraint."
>
> *Behagen v. Amateur Basketball Ass'n of the United States,* 884 F.2d 524, 528 (10th Cir.1989) (quoting 36 U.S.C. § 391(b)(4)).

The ASA provides:

(a) Authority—For the sport that it governs, a national governing body may—

(1) represent the United States in the appropriate international sport federation;

(2) establish national goals and encourage attainment of those goals;

(3) serve as the coordinating body for amateur athletic activity in the United States; . . .

(6) recommend to the [USOC] individuals and teams to represent the United States in the Olympic Games . . .

36 U.S.C. § 220523.

For the sport that it governs, a national governing body *shall*—

(1) develop interest and participation throughout the United States and be responsible to the persons and amateur sports organizations it represents;

(2) minimize, through coordination with other amateur sports organizations, conflicts in the scheduling of all practices and competitions[.]

36 U.S.C. § 220524 (emphasis added). "The [ASA] provides for ongoing review of the NGB by the USOC in order to ensure compliance with the [ASA]." *Behagen,* 884 F.2d at 528.

The USEF is the NGB for equestrian sports in the United States. The USEF *1230 and the Promoter Defendants argue that the ASA confers on the USEF the authority to promulgate the Mileage Rule and that application of the antitrust laws to the enforcement of the Mileage Rules is plainly repugnant to that authority.

In *Behagen,* the Tenth Circuit considered whether the ASA impliedly repealed the antitrust laws. *Id.* In that case, Ronald Behagen, a basketball player, was deemed ineligible to play amateur basketball by the Amateur Basketball Association of the United States of America ("ABA/USA"), the NGB for basketball. *Id.* at 525-26. The ABA/USA had an eligibility rule that stated that once a player had played professionally, he or she could return to amateur basketball only once. *Id.* at 526. Mr. Behagen had played professionally, returned to amateur play, returned to professional play, and again sought to return to amateur play. *Id.* The ABA/USA, based on its eligibility rule, would not permit Mr. Behagen to play. *Id.*

Mr. Behagen alleged that the refusal to permit him to play constituted a violation of § 1 of the Sherman Antitrust Act. *Id.* at 527. Section 1 reads in relevant part, "Every

contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Mr. Behagen alleged that the refusal constituted an illegal group boycott. The jury agreed and awarded him treble damages. *Behagen,* 884 F.2d at 527.

The court held that

> the antitrust issue should not have gone to the jury. The defendants' actions in this case were clearly within the scope of activity directed by Congress, and were necessary to implement Congress' intent with regard to the governance of amateur athletics. We therefore hold that the defendants' allegedly violative actions here are exempt from the coverage of the federal antitrust laws.

Id. The court reasoned that the ASA conferred "monolithic control" on the NGB to regulate "its particular amateur sport, including . . . controlling amateur eligibility for Americans to participate in that sport." *Id.* at 529. Although the ASA did not explicitly repeal the federal antitrust laws as they pertain to the actions of an NGB, "the directives of the [ASA made] the intent of Congress sufficiently clear." *Id.* Mr. Behagen complained of "exactly that action which the [ASA] directs—the monolithic control of an amateur sport by the NGB for that sport . . .." *Id.*

The question whether the ASA impliedly repeals antitrust laws was again considered in *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.,* 213 F.3d 198 (5th Cir.2000). In *Eleven Line,* the owner of an indoor soccer facility brought suit against the North Texas State Soccer Association ("NTSSA"), alleging it violated the antitrust laws in enacting a rule that forbade its members from playing at any non-NTSSA sanctioned facility. *Id.* at 199. The court concluded that the actions of the NTSSA were

not immune from antitrust liability because it was the state association, not the NGB, that promulgated the rule. *Id.* at 204. However, it concluded that *Behagen* was correctly decided. It explained,

> Although the facts of this case do not support an implied exemption from the antitrust laws, an implied exemption would be appropriate in many other situations. For example, if the national state associations all over the country had a similar rule, one could infer that the rule was necessary to the management of the sport.

Id.

As *Behagan* and *Eleven Line* demonstrate, when properly exercised, the "monolithic *1231 control" a NGB has over its particular support may excuse actions that would otherwise violate antitrust laws. Therefore, the question for this Court is whether the application of the antitrust laws to the facts of this case would "unduly interfere" with the "operation" of the ASA. *Gordon,* 422 U.S. at 686, 95 S.Ct. 2598.

Congress has specifically required NGB's to minimize conflicts in the scheduling of competitions and to "develop interest and participation throughout the United States" in their particular sport. 36 U.S.C. § 220524. The Mileage Rule functions to minimize conflicts and encourages interest in equestrian sports. It forbids competitions of the same rating from being held on the same days within 250 miles of each other. The USEF and the Promoter Defendants adduced evidence that the rule enables the best athletes to compete against each other. If two competitions of the same rating were in close proximity, top athletes may avoid competition against each other and go to different competitions. The USEF and the Promoter Defendants also produced evidence that the rule protects horses from being overworked. If two competitions were

very close by on the same dates, horses may be taken from one competition to the next without sufficient rest. Additionally, the rule encourages the spread of equestrian sports throughout the country. If a competition cannot be held in one locality, a promoter may decide to hold a competition in a region in which competition has never been held. Therefore, the Mileage Rule is an exercise of the "monolithic control" Congress conferred on the USEF.

JES and Mr. Gallagher argue that the USEF and the Promoter Defendants should not enjoy implied immunity because the Mileage Rule is not "necessary" for the USEF to perform its functions under the ASA. They focus on language in *Behagen:* "defendants' actions in this case were clearly within the scope of activity directed by Congress, and were *necessary to implement Congress' intent with regard to the governance of amateur athletics.*" *Behagen,* 884 F.2d at 527 (emphasis added). JES and Mr. Gallagher contend that if the USEF and equestrian sports can function without the Mileage Rule, the USEF and the Promoter Defendants are not entitled to immunity.

JES's and Mr. Gallagher's arguments regarding why the Mileage Rule is not necessary focus on whether the rule is an effective or wise way of implementing the power given the USEF to minimize conflicts in scheduling and develop interest in equestrian sports throughout the United States. They argue, in effect, that the rule is underinclusive because it can be waived in various circumstances. They argue that the rule is counterproductive because it impedes JES and Mr. Gallagher from entering the sport and competing with other promoters to enhance the quality of competitions. They also argue that because the rule was not promulgated until 1975, it must not be necessary (or else it would have been promulgated earlier). They argue that because in the Northeast, the required distance between competitions is only 125 miles, the 250-mile restriction must not be necessary.

JES's and Mr. Gallagher's reading of *Behagen* is inconsistent with Supreme Court authority. In *Gordon*, the Supreme Court considered a challenge to commission rates fixed by the New York Stock Exchange ("NYSE"). *Gordon*, 422 U.S. at 661-62, 95 S.Ct. 2598. It concluded that the NYSE had immunity from antitrust liability because the power to fix commission rates was specifically conferred by the Securities Exchange Act. *Id.* at 668, 691, 95 S.Ct. 2598. The United States, as amicus, argued that whether a defendant is entitled to implied immunity was a question *1232 of fact to be decided after a trial on the merits. *Id.* at 686, 95 S.Ct. 2598. The Court concluded that this argument "confused two questions." *Id.* at 688, 95 S.Ct. 2598. The Court explained:

> On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorized the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity.

Id.

Additionally, JES's and Mr. Gallagher's understanding of what makes a rule "necessary" according to *Behagen* is too restrictive. In *Behagen*, the court did not consider whether the *particular* eligibility rule was necessary or otherwise examine the wisdom of the rule. It simply

concluded that promulgating eligibility rules was necessary in order for the NGB to carry out its role as defined by the ASA. *See generally Behagen,* 884 F.2d 524- 30. Similarly, in *Eleven Line,* the court concluded that the NTSSA rule was not necessary. *Eleven Line,* 213 F.3d at 204-05. However, the court then listed a whole host of rationales that may have justified the NTSSA rule. It did not delve into an analysis of whether the rule would be wise or indispensable under any of those circumstances. *Id.*

This Court will not substitute its own judgment for that of the USEF regarding the optimum way to fulfill its obligations. *Cf. Brookins v. Int'l Motor Contest Ass'n,* 219 F.3d 849, 853 (8th Cir.2000) (stating that regarding antitrust challenges to rules defining professional sports activities, authorities have been given considerable discretion to achieve their sporting objectives, absent any demonstrated market foreclosure). If this Court were to apply the test that JES and Mr. Gallagher suggest—determining whether the Mileage Rule is necessary—it would threaten the national uniformity Congress envisioned in enacting the ASA. *San Francisco Arts & Athletics, Inc.,* 483 U.S. at 544, 107 S.Ct. 2971 (discussing need for ASA to eliminate factions in amateur sports). This inability to engage in the analysis JES and Mr. Gallagher suggest without disrupting the ASA illustrates why implied immunity is called for in this case. The question before this Court is whether the application of antitrust laws to the actions of the USEF and the Promoter Defendants is "plainly repugnan[t]" to the ASA. *Gordon,* 422 U.S. at 682, 95 S.Ct. 2598. Because the ASA requires an NGB to promulgate rules to minimize conflicts in schedules, the imposition of antitrust liability for the promulgation of such a rule is "plainly repugnan[t]" to the ASA.

JES and Mr. Gallagher also argue that this Court should apply a multi-factor test enunciated by the Second Circuit in *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir.2005) to the question whether the ASA impliedly repeals the antitrust laws. In *Billing*, the court held that when a "potential specific conflict" exists between a regulatory rule and antitrust laws courts

> will apply immunity if [they] determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed. That determination *1233 is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal.

Id. at 164-65.

JES's and Mr. Gallagher's arguments applying *Billing* in substance repeat the arguments pertaining to whether the Mileage Rule is necessary. They argue that the Mileage Rule, as a particular exercise of power by the USEF, is not what Congress had in mind when it enacted the ASA and granted NGB's authority. Regardless of whether *Billing* would require a more searching scrutiny of the Mileage Rule, this Court follows the more closely analogous holdings in *Behagen* and *Eleven Line.*

AFFIRMED.

United States District Court,
M.D. Florida.

JES PROPERTIES, INC. d/b/a Cypress Trails Farm, a Florida corporation, and
Michael W. Gallagher, Plaintiffs,
v.
USA EQUESTRIAN, INC. (formerly the American Horse Show Association), et al.,
Defendants.
No. 802CV1585T24MAP.

May 9, 2005.

ORDER

BUCKLEW, J.

*1 This cause comes before the Court for consideration of the following motions: Defendant United States Equestrian Federation, Inc.'s ("USEF") Motion for Summary Judgment and Request for Oral Argument (Doc. No. 287); Defendants', David E. Burton, Sr., David E. Burton, Jr., Burton and Sons, Inc. and Littlewood Fences, Inc. (collectively, "the Burton Defendants"), Motion for Summary Judgment (Doc. No. 290); Defendants', Thomas Struzzieri ("Struzzieri"), Horse Shows in the Sun, Inc. ("HITS") and Rose View Stables, Ltd. ("Rose View Stables")(collectively "the HITS Defendants"), Motion for Summary Judgment (Doc. No. 292) and Defendants, Stadium Jumping, Inc. ("Stadium Jumping") and Eugene R. Mische ("Mische)(collectively, "the Stadium Jumping Defendants"), Motion for Entry of Final Summary Judg-

ment (Doc. No. 294).[1] The Court shall refer to the Burton Defendants, the HITS Defendants and the Stadium Jumping Defendants collectively as the "Promoter Defendants." With leave of the Court, Plaintiffs filed a Combined Response to Defendants' Summary Judgment Motions (Doc. No. 317)(hereinafter "Response to Motions for Summary Judgment"). With leave of the Court, USEF filed a Reply Brief on the Limited Issue of Antitrust Immunity (Doc. No. 343) and Plaintiffs filed a Sur-Reply to USEF's Reply on the Limited Issue of Antitrust Immunity (Doc. No. 344).

I. Procedural History

On August 29, 2002, Plaintiffs filed a three-count Complaint which raised claims of unreasonable restraint of trade under section 1 of the Sherman Act (Count I), monopolization and attempted monopolization under section 2 of the Sherman Act (Count II), and claims of conduct, practices and activities which have the likelihood of substantially lessening competition under section 7 of the Clayton Act (Count III). Upon Defendants' motions this Court dismissed the Complaint, but granted Plaintiffs leave to amend (Doc. No. 39).

On April 18, 2003, Plaintiffs filed a nine-count Amended Complaint (Doc. No. 42) in which they alleged claims for

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[1] The Court notes that the only other remaining Defendants, Linda S. Aldrich and Fox Lea Farm, Inc. did not file dispositive motions. Several Defendants, USA Equestrian Trust, Inc., f/k/a USA Equestrian, Inc. ("USAE") (formerly The American Horse Shows Association, Inc.("AHSA")), Bob Bell, Classic Company Ltd., Kernan Hodges a/k/a Mrs. George H. Hodges, Jr. and North Florida Hunter & Jumper Association, Inc. apparently settled with the Plaintiffs and have been dismissed from the case (Doc. Nos. 195, 261, 267 and 350).

violation of Section 1 of the Sherman Act, violation of Section 2 of the Sherman Act, violation of Florida's Antitrust Act and violation of the Florida Deceptive and Unfair Trade Practices Act. In the Amended Complaint, Plaintiffs also added an additional Defendant, North Florida Hunter & Jumper Association, Inc. ("NFHJA"). On October 10, 2003, this Court denied Defendants' Motions to Dismiss the First Amended Complaint (Doc. No. 59).[2]

On December 19, 2003, Plaintiffs sought leave to file a fourteen count Second Amended Complaint to add Eugene R. Mische, Stadium Jumping, Inc., Thomas E. Struzzieri, Horse Shows in the Sun, Inc., Linda S. Aldridge, Fox Lea Farm, Inc., and United States Equestrian Federation, Inc. ("USEF") as additional defendants (Doc. No. 77). As Defendants did not oppose this second amendment, the Court granted Plaintiffs leave to file a Second Amended Complaint (Doc. No. 81). In the Second Amended Complaint, Plaintiffs again alleged claims for violation of Section 1 of the Sherman Act, violation of Section 2 of the Sherman Act, violation of Florida's Antitrust Act and violation of the Florida Deceptive and Unfair Trade Practices Act.

*2 Almost a year later, on December 16, 2004, Plaintiffs sought leave to file a Third Amended Complaint to add Roseview Stables Ltd. as an additional defendant (Doc. No. 250). Again Defendants did not oppose this third amendment, and the Court granted Plaintiffs leave to file a Third Amended Complaint (Doc. No. 257). In the Third Amended Complaint, Plaintiffs allege that the rules of USAE and

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[2] The Court notes that as to Plaintiff Gallagher, the Court granted without prejudice the Burton Defendants' Motion to Dismiss the First Amended Complaint since Plaintiff Gallagher did not allege compliance with "the Federation procedures and did not plead he sought a waiver of the Mileage Rule from the Burton Defendants" (Doc. No. 59).

USEF, more specifically, the "Mileage Rule,"[3] and Defendants' alleged refusal to waive application of that rule violate section 1 of the Sherman Act (Count I). Counts II—IV raise claims of monopolization, attempted monopolization, and conspiracy to monopolize in violation of section 2 of the Sherman Act. Counts V-VIII raise claims of violations of the Florida Antitrust Act, Fla. Stat. § § 542.18 and 542.19. Count IX alleges violations of the Florida Deceptive and Unfair Trade Practices Act. USEF, the Burton Defendants, the HITS Defendants and the Stadium Jumping Defendants now move for summary judgment as to all counts of the Third Amended Complaint.

II. Factual Background[4]

This antitrust case arises from an unusual factual situation involving the sanctioning of hunter and jumper horse show competitions in the state of Florida during the winter months. USEF, a New York not-for-profit corpora-

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[3] The Mileage Rule provides, in part, that in all States other than Maine, New Hampshire, Vermont, Connecticut, Rhode Island, New Jersey, New York and Pennsylvania, horse shows offering "A" rated hunter and jumper events must be held at least 250 miles apart on the same date. The Mileage Rule may be waived by a conflicting horse show promoter.

[4] The Court will not restate the entire factual background of this case. Instead, the Court incorporates by reference the factual background as outlined in the Court's Order granting the Burton Defendants, the Federation, the Bell Defendants and Defendant Hodges' Motions to Dismiss (Doc. No. 39) and the Court's Order denying Defendants' Motion to Dismiss the First Amended Complaint (Doc. No. 59).

tion, is the current[5] national governing body ("NGB") for equestrian sport in the United States under the Ted Stevens Olympics and Amateur Sports Act ("Amateur Sports Act" or "ASA"), 36 U.S.C. § § 220501 et seq. (Doc. No. 289, Exh. 1, Long Decl., ¶ 3 and Doc. No. 317, Exh. H, O'Connor Dep. p. 23). USEF has over 80,000 members in 27 breeds and disciplines. (Doc. No. 305). USEF is not a promoter, operator, or manager of horse shows. (Doc. No. 289, Exh. 1, Long Decl., ¶ 17). USEF did not exist prior to 2003 and has been the NGB for equestrian sport in the United States since June 2004. (Doc. No. 289, Exh. 1, Long Decl., ¶ 4). USEF is a separate legal entity from USAE with its own ownership and management. (Doc. No. 289, Exh. 1, Long Decl., ¶ 8). Due in part to a delay in the Internal Revenue Service's recognizing USEF's not-for-profit status, which is a requirement under the Amateur Sports Act for all NGBs, USEF entered into a Management and License Agreement ("Agreement") with USAE. Under this Agreement, USEF carried out USAE's obligations as the NGB from December 2003 through May 2004, including processing applications for the current equestrian competition year (2005) on behalf of USAE. (Doc. No. 289, Exh. 1, Long.Decl., ¶ 5).

USEF, and predecessor NGBs, promulgated a variety of rules, including rules that sanction hunter and jumper horse shows as "Recognized Competitions."[6] (Doc. No. 305, GR208, pp. GR11—GR12). These rules are embodied in the

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[5] Replacing former NGB, USA Equestrian, Inc. ("USAE"), formerly known as the American Horse Show Assocation ("AHSA"). In its previous Orders, the Court referred to USAE as the Federation for that period prior to December 1, 2003.

[6] The Court notes that in their Third Amended Complaint the Plaintiffs utilize the term "Recognized Horse Shows."

2005 USEF Rule Book. (Doc. No. 305). Each Promoter Defendant agrees to abide by the rules as a condition of membership. (Doc. No. 305, GR210, pp. GR12—GR13). Recognized Competitions enjoy privileges not available to other competitions. (Doc. No. 305, GR209, p. GR12). Plaintiffs allege that Recognized Competitions provide unique benefits to competitors and those who put on horse shows which are only available by repeat participation at such USEF-sanctioned shows. Plaintiffs further allege that horse show promoters can benefit economically from holding Recognized Competitions. (Doc. No. 317, Exh. K, Weiland Decl ., ¶ ¶ 15 and 16). The Mileage Rule which governs Recognized Competitions for hunter and jumper competitions rated "A" and above[7] ("A-Rated Shows") was implemented in 1975. (Doc. No. 317, Exh. I, Balch Dep. p. 100).

*3 In its current form, the Mileage Rule, for hunter and jumper Recognized Competitions in Group 2 states (which includes Florida), provides a "250-mile radius for competitions with any of the same A rated sections, or unrated Jumper sections and classes with total prize money of $10,000 or more." (Doc. No. 305, GR214(2), p. GR16). In the 1980's the Mileage Rule applicable to the New England and Middle Atlantic states was reduced to a 125 miles radius. (Doc. No. 305, GR214(1), pp. GR15—GR16; Doc. No. 317, Exh. L, Swann Decl., ¶ 8 and Doc. No. 317, Exh. L, Long Dep. p. 99). Lesser mileage distances apply for "B" and "C" rated horse shows. (Doc. No. 305, GR214(2), pp.GR15—GR16). USEF General Rule 214(7),[8] which controlled the sanctioning of new A-Rated Shows during the course of the present litigation and is part of the Mileage Rule, stated in relevant part:

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[7] "A" or "AA."

[8] Now amended.

New competitions offering "A" rated hunter or jumper divisions or sections will not be recognized on dates conflicting with those of any other Recognized Competitions within the applicable distance specified by this rule which offers A rated hunter or jumper divisions or sections, regardless of class scheduling . . . The mileage restrictions . . . will not prevent two Hunter/Jumper competitions from being approved if the two competitions have different competition managements and the competition with priority gives written permission, to be renewed annually, and the mileage distance between the competitions is at least 10 miles.

(Doc. No. 305, GR214(7), pp.GR16 -GR17).

USEF initially adopted the rules of the Federation as its own. (Doc. No. 289, Exh. 1, Long Decl., ¶ 9). In January 2004, the USEF Board created a task force to study the Mileage Rule and related rules, and recommend appropriate changes, if any. (Doc. No. 289, Exh. 1, Long Decl., ¶ 10). In January 2005, USEF's Board passed several rule changes (the "January 2005 rule changes"),[9] including but not limited to: 1) giving USEF ultimate control over the granting or denying of waivers under the Mileage Rule, and 2) enacting a "license agreement" regime under which USEF has the right to refuse to renew applications of now-established competitions if such competitions fail to satisfy certain objective standards. (Doc. No. 289, Exh. 1, Long Decl., ¶ 11 and Doc. No. 344, Exh. A.). By way of example, although the Mileage Rule previously provided that a promoter of a horse show could, in its sole discretion, waive an objection to the holding of another similarly rated horse show within the applicable mileage restriction, new General Rule 213 provides, in relevant part: "The Federation shall reserve the right to have final approval on the

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[9] Effective May 1, 2005.

granting or denying of waivers and will not delegate this responsibility to any other entities or parties." (Doc. No. 289, Exh.1, Long Decl., Exh. C thereto and Doc. No. 344, Exh. A thereto). No mileage restrictions apply to a horse show promoter who wishes to hold a horse show that is "unrated,"i.e., not sanctioned by the USEF. (Doc. No. 286, Struzzieri Decl., ¶ 4).

*4 In their Third Amended Complaint, Plaintiffs define the relevant product market as "[h]unter and jumper equestrian competitions recognized by the Federation as hunter and jumper competitions 'A' rated and above." Third Am. Compl. ¶ 151. They also define the relevant geographic market as the state of Florida between December 1 and March 31 of each year (the "Winter Months"). Third Am. Compl. ¶ ¶ 154—158. Therefore, the Relevant Market is defined as A-Rated Shows in the state of Florida during the Winter Months. Third Am. Compl. ¶ 159.[10]

Plaintiffs are horse show promoters. Dr. Douglas Weiland ("Weiland"), the principal of Plaintiff JES Properties, Inc. ("JES"), began holding unrecognized horse shows at his Cypress Trails Farm facility in Odessa, Florida in 1998. (Doc. No. 317, Exh. K, Weiland Decl. ¶ ¶ 3 and 4). Weiland registered JES with USAE in 2000 and began to conduct Recognized Competitions during the summer months since no other promoters had conflicting dates in those months. (Doc. No. 317, Exh. K, Weiland Decl., ¶ 4). Weiland held six A-Rated Shows at Cypress Trails Farm in

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[10] For the limited purpose of ruling on Defendants' summary judgment motions this Court will accept that Plaintiffs' definition of the Relevant Market is correct. However, the Court notes that the Burton Defendants and HITS Defendants argue that the relevant product market should not be "A" rated hunter and jumper shows (Doc. Nos. 291 and 292).

the summers of 2001 and 2002,[11] and held 25 unrated shows between 1998 and 2003. (Doc. No. 317, Exh. K, Weiland Decl., ¶ 11). Weiland intended to run A-Rated Shows in the Relevant Market if it was possible to do so. (Doc. No. 317, Exh. K, Weiland Decl., ¶ 14). However JES was unable to obtain dates for A-Rated Shows in the Relevant Market due to the application of the Mileage Rule by the NGB and JES' inability to obtain waivers from the Promoter Defendants who controlled the dates. (Doc. No. 317, Exh. K, Weiland Decl., ¶ ¶ 21—23). JES was actually unable to hold horse shows at the Cypress Trails Farm after 2003 due to zoning regulations. (Doc. No. 317, Exh. K, Weiland Decl., ¶ 24). However, Weiland alleges he would have conducted shows at other properties had he been able to obtain entry into the Relevant Market (Doc. No. 317, Exh. K, Weiland Decl., ¶ 25).

Plaintiff Gallagher ("Gallagher") conducted both A-Rated and unrated shows in the Tallahassee area. (Doc. No. 317, Exh. O, Gallagher Decl. ¶ ¶ 8—10). Gallagher alleges he has experience developing an equestrian facility in the Tallahassee area and has been approached about developing additional facilities and "residential communities surrounding them." (Doc. No. 317, Exh. O, Gallagher Decl. ¶ 11). Gallagher also has attempted to promote A-Rated Shows in the Relevant Market, but has been unable to obtain dates for A-Rated Shows in the Relevant Market due to the application of the Mileage Rule by the NGB and Gallaher's inability to obtain waivers from the Promoter Defendants who controlled the dates. (Doc. No. 317, Exh. O, Gallagher Decl., ¶ ¶ 12 and 13). Gallagher alleges that he has the financial backing needed to promote and manage A-Rated Shows. (Doc. No. 317, Exh. O, Gallagher Decl., ¶ 14).

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[11] The Court notes that it is unclear from the record whether Weiland held six A-Rated Shows each summer or in total.

The Burton Defendants conduct A-Rated Shows. (Doc. No. 291, Exh. A., Burton, Sr. Dep. Vol. I p. 141; Exb. B., Burton, Jr. Dep. p. 113). None of the Burton Defendants were involved in the adoption of the Mileage Rule or related rules. (Doc. No. 291, Exh. A, Burton, Sr. Dep. Vol. II pp. 12 -13; Exh. B., Burton, Jr. Dep. p. 130). Cypress Trails Farm[12] unsuccessfully sought waivers of the Mileage Rule from each of the Burton Defendants. (Doc. No. 291). Gallagher unsuccessfully sought waivers of the Mileage Rule from each of the Burton Defendants. (Doc. No. 291). The decisions by each of the Burton Defendants not to grant waivers of the Mileage Rule were unilateral decisions. (Doc. No. 291, Exh. A, Burton, Sr. Dep. Vol. II pp. 52-68 and 77-79; Exh. B, Burton, Jr. Dep. pp. 186—197).

*5 Defendant Thomas E. Struzzieri ("Struzzieri") is the sole owner of Horse Shows in the Sun, Inc. ("HITS") and Rose View Stables, Ltd. ("Rose View Stables")(collectively "the HITS Defendants"). (Doc. No. 286, Struzzieri Decl., ¶ 2). From 1998 through late 2002, Struzzieri was a member of the board of directors of USAE. He was one of approximately 64 board members. (Doc. No. 286, Struzzieri Decl., ¶ 11). In January 2005, Struzzieri became a board member of USEF. (Doc. No. 289, Long Decl., ¶ 13). From 1990 to the present, Struzzieri has been a member of the Competition Management Committee for USAE and USEF. (Doc. No. 286, Struzzieri Decl., ¶ ¶ 12 and 14).

Since 1981 the HITS Defendants have been holding and promoting horse shows throughout the United States, including shows in California, Arizona, Florida, New York, Virginia and Massachusetts. (Doc. No. 286, Struzzieri Decl., ¶ 2). For each of the last three (3) years, the HITS Defendants have held seven (7) hunter/jumper shows in the state of Florida at a facility in Ocala, Florida. Of these

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[12] JES d/b/a Cypress Trails Farm.

seven (7) shows, five (5) were A-Rated Shows held on consecutive weeks in February and March. The other two (2) horse shows were "unrated" hunter/jumper shows held in January. (Doc. No. 286, Struzzieri Decl., ¶ 5). Except for the five (5) week period during the months of February and March, the HITS Defendants do not hold any USEF sanctioned horse shows in the state of Florida.

In 2003, the HITS Defendants received a Mileage Rule waiver request from Weiland, on behalf of JES.[13] This was the first request for a waiver that the HITS Defendants had ever received from JES. (Doc. No. 286, Struzzieri Decl., ¶ 7). JES failed to provide the HITS Defendants with specific details regarding the location of the contemplated show, and the waivers were not only for 2004 but for all years thereafter; therefore, the HITS Defendants did not provide JES with the waiver of the Mileage Rule. (Doc. No. 286, Struzzieri Decl, ¶ 7). The HITS Defendants received a similar request from Gallagher and similarly did not provide Gallagher with the waiver. (Doc. No. 286, Struzzieri Decl., ¶ 8). In 2004, the HITS Defendants again received waiver requests from Plaintiffs for show dates in February and March of 2005. The HITS Defendants again decided not to grant such requests based upon the fact that the Plaintiffs had filed this lawsuit against the HITS Defendants (Doc. No. 286, Struzzieri Decl., ¶ 17).

Defendant Stadium Jumping first received a Mileage Rule waiver request from JES in May 2003.[14] (Doc. No.

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[13] The dates that were subject to JES' request were February 4-8, 2004, February 11—15, 2004, February 18—22, 2004, February 25—29, 2004, March 3-7, 2004 and March 10—14, 2004. (Doc. No. 286, Struzzieri Decl., ¶ 7).

[14] The dates that were subject to JES' request were February 5-9, 2003, February 12—16, 2003, February 19—23, 2004, February

(continued...)

293, Mische Decl., ¶ 2). On May 12, 2003, Defendant Stadium Jumping responded to JES by denying JES' waiver request. (Doc. No. 293, Mische Decl., ¶ 3). Defendant Stadium Jumping elected not to respond to subsequent waiver requests received from JES. (Doc. No. 293, Mische Decl., ¶ ¶ 6, 9 and 12). Defendant Stadium Jumping received similar requests from Gallagher and similarly did not provide Gallagher with waivers or respond to his requests. (Doc. No. 293, Mische Decl., ¶ ¶ 8, 9 and 12). Defendant Stadium Jumping's decisions not to grant waivers of the Mileage Rule, or respond to Plaintiffs' requests, were unilateral decisions. (Doc. No. 293, Mische Decl., ¶ ¶ 4,6,9, and 12).

*6 Defendant Eugene R. Mische ("Mische") personally, or in the name of Defendant Stadium Jumping, has been a member of USEF and its predecessor organizations for more than thirty (30) years. Mische states that other than a *de minimis* role based on his being a member of USEF, he had no actual role in the institution or development of the Mileage Rule. (Doc. No. 293, Mische Decl., ¶ 13). Mische further claims that in the past, Defendant Stadium Jumping has granted Mileage Rule waivers to promoters, including Defendant Horse Shows in the Sun and Defendant Burtons & Sons, Inc. These waivers "were granted by Stadium Jumping without being conditioned on giving, or not giving, any future 'waivers' or permissions to those promoters or any other promoters who might make such requests in the future." (Doc. No. 293, Mische Decl., ¶ 14).

The Promoter Defendants do not control or dictate USEF policies and rules. (Doc. No. 289, Exh.1, Long Decl., ¶ 15

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[14] (...continued)
26—March 3, 2003, March 5-9, 2003, March 13—16, 2003, March 19—23, 2003 and March 25—29, 2004 (Doc. No. 293, Mische Decl., Exh. A).

and Doc. No. 293, Mische Decl., ¶ 15). Rather, the power to make and change USEF rules is placed by USEF's bylaws with USEF's fifty-four member Board of Directors. (Doc. No. 305, pp. ix—x). Of the fifty-four Board of Directors members, only ten (two of whom are athlete seats mandated by the Amateur Sports Act), represent the hunter and/or jumper communities. (Doc. No. 305, pp. x—xi and Doc. No. 289, Long Decl., ¶ 13). Only Defendant Struzzieri is currently a board member of USEF. (Doc. No 289, Long. Decl., ¶ 13). Furthermore, USEF committees, such as the Competition Management committee, have no power to make or change USEF rules but can only make recommendations for rule changes to the Board of Directors. (Doc. No. 305, p. xxix; Doc. No. 289, Long Decl., ¶ 14 and Doc. No. 286, Struzzieri Decl., ¶ 14).

III. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court that there is an absence of evidence to support the non-moving party's case. *Id. at 325.* Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. *See id.* When a moving party has discharged its burden, the non-moving party must then "go beyond the pleadings," and by its own affidavits, or by

"depositions, answers to interrogatories, and admissions on file," designate specific facts showing there is a genuine issue for trial. *Id.* at 324.

*7 In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the non-movant and resolve all reasonable doubts in that party's favor. *See Samples on behalf of Samples v. City of Atlanta,* 846 F.2d 1328, 1330 (11th Cir.1988). The Eleventh Circuit has explained the reasonableness standard:

> In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." [citation omitted]. The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir.1988).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. *See Augusta Iron & Steel Works v. Employers Ins. of Wausau,* 835 F.2d 855, 856 (11th Cir.1988). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it

is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

IV. Discussion

The question before this Court is whether there are grounds for relief under the antitrust laws based upon the alleged anticompetitive impact of the Promoter Defendants' adherence to the rules promulgated by the national governing body of equestrian sport in the United States. Plaintiffs have asserted claims against the Promoter Defendants and USEF based upon Plaintiffs' inability to obtain permission to hold or promote A-Rated Shows in Florida between December 1 and March 31. The crux of Plaintiffs' claims is that the Promoter Defendants illegally use USEF's rules to insulate themselves from economic competition in the horse show industry. Specifically, as a result of the Promoter Defendants' adherence to USEF's rules, Plaintiffs argue that "at least one incumbent promoter of an A-Rated Show exists for every winter weekend in Florida, preventing any other promoters from entering the market and engaging in head-to-head competition within the 250-mile radius" (Doc. No. 317). By way of example, Plaintiffs contend that "the 250 mile radius prevents A-Rated Shows from being held in the Tampa, Orlando or Jacksonville metro areas if a similar show is being held in the Palm Beach County area, unless the incumbent promoter grants a waiver" (Doc. No. 317). Plaintiffs refer to the Promoter Defendants' alleged illegal conduct as granting them "perfect and permanent serial monopolies for their protected dates" (Doc. No. 317).

1. Ted Stevens Olympics and Amateur Sports Act, 36 U.S.C. § § 220501 et seq.

*8 USEF argues that it is exempt from antitrust liability for the subject Mileage Rule under the Ted Stevens Olympics and Amateur Sports Act, 36 U.S.C. § § 220501 et seq. (the "Amateur Sports Act" or "ASA"). The Promoter Defendants all contend that since USEF enjoys antitrust implied immunity in connection with the establishment and enforcement of the Mileage Rule, they should likewise be immune from antitrust liability for exercising their right not to waive the application of the rule. Plaintiffs respond that there is no support in the case law for such an expansive view of implied antitrust immunity. Plaintiffs further contend that while USEF may be the NGB for equestrian sport, the Mileage Rule is not necessary for any of the core functions of the NGB and serves no legitimate purpose.

The Amateur Sports Act was enacted "to correct the disorganization and serious factional disputes that seemed to plague amateur sports in the United States." *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm'n,* 483 U.S. 522, 544, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987) (citations omitted). Under the Amateur Sports Act, the United States Olympic Commission ("USOC") is authorized to recognize one NGB for each sport included in the program of the Olympic Games. As the recognized NBG for equestrian sport in the United States, USEF is mandated to regulate the sport. The Amateur Sports Act provides in relevant part:

(a) Authority.—For the sport that it governs, a national governing body may—

(1) represent the United States in the appropriate international sport federation;

(2) establish national goals and encourage the attainment of those goals;

(3) serve as the coordinating body for amateur athletic activity in the United States; . . .

(6) recommend to the corporation [15] individuals and teams to represent the United States in the Olympic Games. . . .

36 U.S.C. § 220523.

For the sport that it governs, a national governing body shall—

(1) develop interest and participation throughout the United States and be responsible to the persons and amateur sports organizations it represents;

(2) minimize, through coordination with other amateur sports organizations, conflicts in the scheduling of all practices and competitions. . ..

36 U.S.C. § 220524.

To the extent that courts have considered antitrust challenges to rules defining professional sports activities, the rulemaking authorities have been given considerable discretion to achieve their sporting objectives, in the absence of any demonstrated market foreclosure. *See Brookins v. Int'l Motor Contest Ass'n,* 219 F.3d 849, 853 *(8th Cir.2000).* While the Amateur Sports Act does not expressly exempt amateur sports activities from the antitrust laws, courts have found implied antitrust immunity. *See Behagen v. Amateur Basketball Ass'n of the United States,* 884 F.2d 524 (1989). USEF argues that because § 220524(2) of the Amateur Sports Act confers on USEF an obligation to minimize scheduling conflicts,

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[15] The USOC.

USEF is entitled to antitrust immunity with respect to the Mileage Rule. This Court Agrees.

*9 In *Behagen*, a former amateur basketball player, Ronald Behagen ("Behagen") lost his amateur eligibility status[16] after playing professional basketball for a second time. The ABA/USA, the NGB for basketball, had enacted a player eligibility rule that provided that an athlete could reclaim amateur status only once after playing professional basketball. When Behagen's amateur status was not reinstated, he brought suit alleging in part that the player eligibility rule constituted an illegal group boycott under section 1 of the Sherman Antitrust Act ("Sherman Act"). *See Behagen*, 884 F.2d at 527. The Tenth Circuit reversed a jury verdict in favor of Behagen on the Sherman Act claim. In finding the player eligibility rule exempt from the coverage of the federal antitrust laws, the Court stated "[t]he defendants' actions in this case were clearly within the scope of activity directed by Congress, and were necessary to implement Congress' intent with regard to the governance of amateur athletics." *Id.* The Court further stated that "the monolithic control exerted by an NGB over its amateur sport is a direct result of the congressional intent expressed in the Amateur Sports Act." *Id.* at 528.

As the NGB for equestrian sport in the United States, USEF performs many functions including the promulgation of scheduling and competition rules such as are at issue in the present case. The Amateur Sports Act requires USEF, as the NGB for equestrian sport, to coordinate amateur equestrian activity in the United States and to

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[16] In order for an American to play basketball in amateur competition outside of the United States, the player is required to qualify as an amateur by receiving a travel permit from the Amateur Basketball Association of the United States ("ABA/USA") and a license from the Federation Internationale de Basketball Amateur ("FIBA")

minimize scheduling conflicts. *See* 36 U.S.C. § § 220524(2) and 220523(a)(3). Plaintiffs concede that USEF promotes the equestrian sport, including the publication of rules and standards for participation, rider and animal safety and judging at competitive shows. Third Am. Compl. ¶ 35. At the very heart of Plaintiffs' lawsuit is their desire to have A-Rated Shows in the Relevant Market sanctioned by USEF and have the ability to utilize the rules of USEF.

Scheduling is central to the governing of any sport. USEF argues that "the Mileage Rule is a scheduling rule that minimizes conflicts between recognized competitions." (Doc. No. 288). USEF further contends that use of mileage as a calender coordinating means, especially where horses are concerned, "is a very good and objective way of doing it." (Doc. No. 289, Exh. 5, Balch Dep., pp. 83—84). Plaintiffs do not dispute that the Mileage Rule minimizes scheduling conflicts between competitions, rather, Plaintiffs contend that the Mileage Rule has anticompetitive effects. However, USEF's Mileage Rule and its enforcement thereof, is exactly the type of action which the Amateur Sports Act directs, that is, "the monolithic control of an amateur sport by the NGB for that sport." *Id.* at 529.

In *Eleven Line Inc. v. North Texas State Soccer Ass'n*, 213 F.3d 198 (5th Cir.2000), one of the few cases examining antitrust liability under the Amateur Sports Act, the Court rejected the application of the implied immunity doctrine and distinguished the facts of the case from *Behagen*. However the *Eleven Line* court based its rejection in large part upon the fact that the United States Soccer Federation ("USSF"), the national governing body, had not issued the rule in question or explicitly approved of it. The *Eleven Line* court acknowledged that "[a]lthough the facts of this case do not support an implied exemption from the antitrust laws, an implied exemption would be appropriate in many other situations." *Eleven Line*, 213 F.3d at 204. In

the case before this Court, USEF as the national governing body of equestrian sport, specifically approved of the Mileage Rule and was aware of its consequences, i.e., that it may preclude a promoter from obtaining a Recognized Competition on a desired date.

***10** Plaintiffs urge this Court to consider the history of the Mileage Rule, and its waiver provision,[17] to determine if there might be a less exclusionary means to carry out the scheduling purpose of the Amateur Sports Act. This approach ignores the existing federal case law on implied immunity under the Amateur Sports Act which acknowledges that a national governing body may exert monolithic control, i.e., *Behagen* and *Eleven Line*. This Court finds that like the player eligibility rule exempted under *Behagen*, the Mileage Rule should be exempted and Plaintiffs' antitrust claims against USEF should be barred since USEF's Mileage Rule minimizes scheduling conflicts and implements Congress' intent with regard to the governance of amateur athletics. Likewise, Plaintiffs' claims against the Promoter Defendants are barred based upon their membership in USEF and/or conduct in compliance with, and pursuant to, the rules and regulations of USEF. In summary, Defendants are entitled to summary judgment on all of Plaintiffs' claims under the doctrine of implied immunity.

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[17] With respect to Plaintiffs' argument that the Mileage Rule does not minimize scheduling conflicts since it permits a promoter to "waive" a mileage conflict, this Court notes that under the January 2005 rule changes, USEF has ultimate control over all waivers (Doc. No. 289, Exh. 1, Long Decl., Exh. C thereto). Furthermore, to the extent Plaintiffs argue that under the January 2005 rule changes, the only modification is that USEF must give prior approval to "the incumbent promoters' veto power," this bolsters the presumption that the Mileage Rule is necessary. Specifically, incumbent promoters may not "dispense" with the Mileage Rule simply because it suits their purposes.

2. Standing

The HITS Defendants and Stadium Jumping Defendants contend[18] that Plaintiffs lack standing to bring the claims asserted in the Third Amended Complaint because they have not suffered the type of injury to business or property contemplated by the Sherman Act. Plaintiff JES[19] responds that it does have standing since it "attempted to enter the Relevant Market for many years" and that "each attempt was precluded by application of the Mileage Rule." Standing is a question of law for the Court to decide. *See Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1448 (11th Cir.1991). "Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws." *Id.* The Eleventh Circuit has identified a two-pronged approach to determine whether a plaintiff has antitrust standing. To be a proper party, a plaintiff must have suffered an antitrust injury and must be an efficient enforcer of the antitrust laws. *See id.* at 1449; *see also Levine v. Central Florida Medical Affiliates, Inc.*, 864 F.Supp. 1175, 1178 (M.D.Fla.1994).

a. Antitrust Injury

Antitrust injury is defined as:

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect anticompetitive effect either of the violation or of anticompetitive effects made possible by the violation.

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[18] The Burton defendants join in the argument.

[19] Plaintiffs' Response to Motions for Summary Judgment incorrectly states that Defendants do not challenge Plaintiff Gallagher's standing to sue.

> It should be, in short, the type of loss that the claimed violation would be likely to cause.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). That is, an antitrust plaintiff must show that his own injury coincides with the public detriment tending to result from the alleged violation. *See Todorov*, 921 F.2d at 1450; *see also Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1493 (11th Cir.1985).

*11 In the case before this Court, Gallagher seeks the profits that he claims he would have made promoting A-Rated Shows during the period within which he was precluded from conducting such shows by reason of the Mileage Rule and the Promoter Defendants' failure to waive the Mileage Rule. JES likewise seeks the profits it claims that it would have made in promoting A-Rated Shows during the period within which it was precluded from conducting such shows. Additionally, JES and Gallagher seek the profits they claim they would have made on housing developments they would have built had they not been precluded from holding A-Rated Shows in the Relevant Market. Plaintiffs further allege that they are harmed by the Mileage Rule in that they cannot offer greater than $10,000 in prize money at the unrated shows that the Mileage Rule restricts them to in the Relevant Market.

In essence, Plaintiffs complain of injury largely to themselves not injury that inures to the public detriment. This is not antitrust injury. The antitrust laws were enacted for the protection of competition, not the competitors. *See Brunswick*, 429 U.S. at 488. In their Response to the Motions for Summary Judgment, Plaintiffs allege the Mileage Rule has caused harm to competition because it has (1) reduced the number of A-Rated Shows in the Relevant Market, (2) increased the costs of participation in

the incumbent shows, and (3) blocked potential new entrants from holding competing shows. (Doc. No. 317, Exh. R, McAnneny Expert Report, filed under seal (S-2)). There are few specific facts in the record to support these allegations, especially the allegation that the Mileage Rule has increased the costs of participation in the incumbent shows. *See Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir.1985). Furthermore, the only examples of "potential new entrants" who have been blocked from holding competing shows are the Plaintiffs themselves. Lastly, while arguably the application of the Mileage Rule may have limited the number of A-Rated Shows in the Relevant Market, it is undisputed that there were at least 26 A-Rated Shows in the Relevant Market in 2004. (Doc. No. 317, Exh. R, McAnneny Expert Report, filed under seal (S-2)).

Furthermore, Plaintiffs allege damages equal to the profits they would have garnered had they been able to share in the Promoter Defendants' alleged monopoly profits. This is not antitrust injury. *See Todorov,* 921 F.2d at 1453. Lastly, as to Plaintiffs' contention that they are entitled to profits they claim they would have made on housing developments, these damages are simply too remote and speculative to serve as a basis for any antitrust injury. In summary, since Plaintiffs have not shown they suffered antitrust injury, they have no standing to assert their claims.

b. Efficient Enforcement of Antitrust Laws

To establish that it is an efficient enforcer of the antitrust laws, a plaintiff must meet the target area test. "The target area test requires that an antitrust plaintiff both 'prove that he is within the sector of the economy endangered by a breakdown of competitive conditions in a particular industry' and that he is 'the target against

which anticompetitive activity is directed." *Florida Seed Co. v. Monsanto Co.*, 105 F.3d 1372, 1374 (11th Cir.1997)(quoting *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 608 (11th Cir.1984)).

***12** Since the Court has found that Plaintiffs suffered no antitrust injury, it need not and will not address whether Plaintiffs would be efficient enforcers of the antitrust laws under the second prong of the standing analysis.

3. Section 1 of the Sherman Act, 15 U.S.C. § 1 (Count I)

Section 1 of the Sherman Act provides, in pertinent part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. Broadly speaking, irrespective of the type of activity challenged, certain elements must be established to prove a violation of section 1:(1) that an agreement exists between two or more entities and (2) that the agreement unreasonably restrains trade. *See Torodov*, 921 F.2d at 1455; *see also Boczar v. Manatee Hospitals & Health Systems, Inc.*, 731 F.Supp. 1042, 1046 (M.D.Fla.1990); *Weight-Rite Golf Corporation, et al. v. United States Golf Association*, 766 F.Supp. 1104, 1108 (M.D.Fla.1991); *Tucci v. Smoothie King Franchises, Inc.*, 215 F.Supp.2d 1295, 1301 (M.D.Fla.2002). As discussed below, the Court finds that Plaintiffs have failed to establish either of the elements necessary to prove a violation of section 1 of the Sherman Act.

a. Contract, Combination or Conspiracy

The threshold element of a section 1 claim is "concerted activity." Mere unilateral conduct is not violative of section

1. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984); *see also Levine*, 72 F.3d at 1545. Section 1 of the Sherman Act does not prohibit independent business decisions but only prohibits concerted action and, thus, requires some agreement, express or implied, between two or more persons. *See Moecker v. Honeywell Int'l, Inc.*, 144 F.Supp.2d 1291, 1300 (M.D.Fla.2001)(citing *Monsanto Co. v. Spray-Rite Serv. Corp.* ., 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)). It is well settled in the Eleventh Circuit that evidence of parallel business behavior, or even conscious parallelism, does not without more,[20]constitute concerted activity. *See City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 570 (11th Cir.1998).

The Promoter Defendants claim that Plaintiffs cannot demonstrate that the Promoter Defendants acted collusively in refusing to grant Plaintiffs' requests for waiver of the Mileage Rule. The Court agrees that there is no record evidence that the Promoter Defendants' refusals to waive the Mileage Rule as to Plaintiffs' proposed A-Rated Shows were anything other than unilateral acts. "The threshold requirement of every conspiracy claim, under both section 1 and section 2, is an agreement to restrain trade. To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.' " *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir.1991)(quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946)). This Court recognizes that it will only be the rare case in which a plaintiff can establish the existence of a conspiracy

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[20] At times referred to as "plus factors."

by showing an explicit agreement and that most conspiracies are inferred "from the behavior of the alleged conspirators." *See id.* However, antitrust law limits the range of permissible inferences from circumstantial or ambiguous evidence in a section 1 case. *See City of Tuscaloosa,* 158 F.3d at 570. To prove a conspiracy, the circumstantial evidence must reasonably tend to exclude the possibility that the alleged conspirators acted independently. *See Seagood,* 924 F.2d at 1574.

*13 With respect to Plaintiffs' contention that the record is "replete" with evidence of written agreements between the HITS Defendants and Stadium Jumping Defendants in which these Promoter Defendants continually agree to grant each other waivers of the Mileage Rule, this Court cannot infer from these agreements any conspiracy or "meeting of the mind" to exclude Plaintiffs from promoting A-Rated Shows in the Relevant Market. Plaintiffs further contend that the NGB "held up their end of the bargain," and participated in the purported conspiracy, by assisting these Promoter Defendants over the years in the implementation of their agreement and denying any conflicting date applications from other promoters pursuant to the Mileage Rule. (Doc. No. 317). However, Plaintiffs concede that the Stadium Jumping Defendants have from time to time granted Mileage Rule waivers to other longstanding horse show promoters in the Relevant Market. (Doc. No. 317, Exh. C). Plaintiffs further concede that "there is no direct evidence of collusion" among the HITS Defendants and Stadium Jumping Defendants in reaching their specific decisions to deny the Plaintiffs' waiver requests. (Doc. No. 317).

Here the evidence Plaintiffs rely upon for the proposition that this Court should infer a conspiracy only demonstrates that the HITS Defendants and the Stadium Jumping Defendants chose to do business with one another. Furthermore, the evidence establishes that over the

years the Stadium Jumping Defendants apparently opted to do business with Kernan Hodges and at least one of the Burton Defendants. As to the Promoter Defendants, "[i]t is well established that a party 'may choose with whom he will do business and with whom he will not do business' and that this behavior referred to as 'exclusive dealing,' will not give rise to liability absent a showing of actual competitive injury." *See Seagood,* 924 F.2d at 1567 (citing *Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc.,* 710 F.2d 752, 772-73 (1983)). Additionally, the conduct of the NGB amounts to little more than enforcing its own rules and minimizing scheduling conflicts as it is required to do.

Here Plaintiffs have presented no credible evidence by which this Court could find a conspiracy. Circumstantial evidence in this case is insufficient to implicate the Promoter Defendants in an agreement to exclude Plaintiffs from promotion of A-Rated Shows in the Relevant Market. This is especially true since each Promoter Defendant, at most, admittedly only has control of a limited number of weekend dates in the alleged Relevant Market and has no control over the remaining dates. Furthermore, in denying the Plaintiffs' waiver requests, the Promoter Defendants complied with the rules of the NGB. Therefore, an agreement between the Defendants has not been established.

b. Unreasonable Restraint of Trade

Even if Plaintiffs were able to demonstrate concerted activity on the part of Defendants, not every agreement that restrains competition will violate the Sherman Act. The Supreme Court has determined that section 1 prohibits only those agreements that *unreasonably* restrain competition. *See National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma,* 468 U.S. 85, 98, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984); *see also Levine.,*

72 F.3d at 1545 (citing *Standard Oil Co. v. United States,* 221 U.S. 1, 58 -64, 31 S.Ct. 502, 55 L.Ed. 619 (1911)). To determine whether an agreement unreasonably restrains trade, courts have applied the rule of reason analysis and the *per se* analysis. *See Boczar,* 731 F.Supp. at 1046. That is, "[a] restraint may be violative of the Sherman Act because it is solely a naked restraint of trade so offensive to competition as to be unreasonable *per se,* or because it runs afoul of the more detailed rule of reason inquiry." *Retina Associates, P.A. v. Southern Baptist Hospital of Florida et al.,* 105 F.3d 1376, 1381 (11th Cir.1997)(citing *F.T.C. v. Indiana Fed'n of Dentists,* 476 U.S. 447, 458, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986)). Plaintiffs contend that the application of the Mileage Rule by the Promoter Defendants as members of the NGB, in failing to grant waiver requests to the Plaintiffs, requires this Court to undertake a *per se* analysis. This Court disagrees and finds the rule of reason analysis is applicable to Plaintiffs' claims.

i. Is the Mileage Rule *Per Se* Unreasonable?

*14 Per se illegality is limited to four categories of trade restraints: (1) horizontal and vertical price fixing; (2) horizontal market divisions; (3) group boycotts or concerted refusals to deal; and (4) tying arrangements. *See Moecker,* 144 F.Supp.2d at 1301 (citing *Seagood Trading,* 924 F.2d at 1567). Plaintiffs allege that through the use of the Federation's prize level restriction within the Mileage Rule, Defendants have fixed, depressed and standardized the amount of money that may be awarded at Recognized Horse Shows resulting in illegal price-fixing that is a per se violation of section 1. Third Am. Compl. ¶ 203. Plaintiffs also allege that the agreement of the Promoter Defendants to enforce the Mileage Rule is a horizontal allocation of markets that is a per se violation of section 1. Third Am.

Compl. ¶ 204. Plaintiffs further allege that "the activity of the Defendants to cause the Federation to deny permission to Plaintiffs to compete in the Relevant Market constitutes an illegal boycott that is a per se violation" of section 1. Third Am. Compl. ¶ 205.

However, in the Eleventh Circuit, "[t]he presumption in cases brought under section 1 of the Sherman Act is that the rule-of-reason standard applies." *Seagood*, 924 F.2d at 1567. Furthermore, there is substantial case law rejecting a *per se* approach in examining the action taken by sporting associations. *See NCAA*, 468 U.S. at 100-01; *see also Cha-Car, Inc. v. Calder Race Course, Inc.*, 752 F.2d 609, 613 (11th Cir.1985); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 652-53 (5th Cir.1977).; *Martin v. American Kennel Club, Inc.*, 697 F.Supp. 997, 1000 (N.D.Ill.1988). Since under a *per se* analysis there is no inquiry into possible justifications for the challenged restraint, the *per se* doctrine should not be extended to restraints that are of ambiguous effect. *See Cha-Car*, 752 F.2d at 612-13.

"The decision to apply the *per se* rule turns on 'whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 289-90, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985)(quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* 441 U.S. 1, 19-20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979)). The Mileage Rule as promulgated by USEF, including its prize money requirement, and application thereof by the Promoter Defendants, is not a practice which facially appears to be one that would always or almost always tend to restrict competition.

Therefore, the Court finds that Plaintiffs have failed to establish *per se* violations of the Sherman Act and a "rule

of reason" analysis should be applied. Specifically, despite Plaintiffs' efforts to couch Defendants' conduct in terms of traditionally per se illegal activities, the field of sports is one "in which horizontal restraints on competition are essential if the product is to be available at all." *See NCAA,* 468 U.S. at 101. That is, the self-regulation which is present here by virtue of the operation of the NGB for equestrian sport exempts Defendants' conduct from *per se* analysis. *See Cha-Car,* 752 F.2d at 614 n. 9.

ii. Is the Mileage Rule Unreasonable Under the Rule of Reason?

***15** "Under Eleventh Circuit case law, alleged Section One agreements analyzed under the rule of reason require a plaintiff 'to prove (1) the anticompetitive effect of the defendant's conduct on the relevant market, and (2) that the defendant's conduct had no pro-competitive benefit or justification.' ' *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc.*,376 F.3d 1065, 1071 (11th Cir.2004) (quoting *Levine,* 72 F.3d at 1551)); *see also Retina Associates,* 105 F.3d at 1383 (requires proof that defendant's conduct had an anticompetitive effect in the relevant market, either by establishing actual anticompetitive effect or potential for genuine anticompetitive effect in defined geographic and product markets, and that no pro-competitive rationale would justify conduct).

The burden of proving an unjustified anticompetitive effect is on the Plaintiffs. *See Seagood,* 924 at 1570. However, since the Defendants do not specifically address whether the alleged violative conduct has restrained competition in the Relevant Market, for purposes of its rule of reason analysis, this Court will presume without finding that Plaintiffs have demonstrated an anticompetitive effect in the Relevant Market. The Court

must then determine whether the Defendants' conduct had any pro-competitive benefit or justification. At the heart of this inquiry is the Mileage Rule itself.

Under the rule of reason analysis, this Court must evaluate the challenged rule in light of the factual context of the particular industry, the history of the restraint, and the reason for its imposition[21] in order to determine whether its anticompetitive effects outweigh its pro-competitive benefits. *See National Society of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *see also Cooney v. American Horse Shows Ass'n,* 495 F.Supp. 424, 431 (S.D.N.Y.1980). The record before this Court demonstrates the reasonableness of the Mileage Rule.

Plaintiffs suggest that the Mileage Rule has no purpose other than to effect some sort of elaborate scheme whereby they are precluded from acquiring their desired dates to promote A-Rated Shows in the Relevant Market. Specifically, Plaintiffs contend "[t]he Mileage Rule has no purpose other than to insure that incumbent promoters of shows covered by the Mileage Rule do not face any competition within a 250 mile radius, unless they are willing in the exercise of their unfettered discretion to tolerate a new entrant by granting a waiver from the Mileage Rule's monopoly grant." Plaintiffs' assertion is not supported by the evidence before this Court.

The Mileage Rule has several pro-competitive functions relating to equestrian sport. As discussed above, the Mileage Rule is an effective way to minimize scheduling conflicts. USEF's Mission Statement states, in relevant part:

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[21] There is no evidence before this Court as to why the Mileage Rule was originally implemented.

> As the National Governing Body (NGB) of Equestrian Sport in the United States we will inspire, encourage interest in, and regulate equestrian competition by ensuring the safety and well-being of the horses . . . promote the pursuit of excellence in equestrian sport from junior and grass roots programs to Olympic Games . . . [t]o accomplish this mission, our members and staff, working together will:

***16** (3) Protect and support the welfare of horses by inspecting, monitoring and testing to deter use of forbidden substances and other cruel, unsafe and/or unsportsmanlike practices and by adopting and enforcing rules to prohibit such practices . . .

(6) Provide the strongest possible U.S. representation internationally . . .

(12) Serve as the coordinating body for equestrian activity in the United States . . .

(13) Coordinate the calender of competitions . . . and provide for varying levels of regional and national competition in a wide variety of disciplines to increase the breadth and depth of the sport throughout the country. . ..

(Doc. No. 305, pp. i-ii). The Mileage Rule aids USEF in ensuring horses and United States athletes can compete at the highest levels both in the United States and internationally. Specifically, the Mileage Rule disperses hunter and jumper competitions geographically, thereby making it more likely that the best athletes and horses will compete against one another. (Doc. No. 289, Exh. 2, O'Connor Decl., ¶ 6, Doc. No. 289, Exh. 5, Balch Dep., pp. 111—112 and Doc. No. 289, Exh. 4, Long Dep., pp. 64—65). A-Rated Shows attract the best athletes and horses. However, not a large number of horses and athletes can compete at the highest levels. If there were numerous A-Rated Shows in close geographic proximity on the same

days, as might occur without the Mileage Rule, it is less likely that the best horses and athletes would compete against each other as the top horses and athletes would instead be dispersed among those A-Rated Shows. (Doc. No. 289, Exh. 2, O'Connor Decl., ¶ 6).

Furthermore, the Mileage Rule promotes the health and welfare of the horses by removing incentives for horse owners to overuse their horses by chasing "points" and prize money on the same or proximate days at multiple competitions in the same geographic area. (Doc. No. 289, Exh. 2, O'Connor Decl., ¶ 7, Doc. No. 289, Exh. 5, Balch Dep., pp. 112—113, 133—137 and Doc. No. 289, Exh. 3, O'Connor Dep., pp. 51—52). Lastly, the Mileage Rule aids USEF in fostering the development of equestrian sport across the United States, not just in former regional centers such as the Northeast. (Doc. No. 289, Exh. 5, Balch Dep., p. 111).

USEF, as the NGB for equestrian sport, utilizes the Mileage Rule to achieve several pro-competitive functions. There is no evidence in the record that in denying the Plaintiffs' waiver requests, the Promoter Defendants as members did any more than abide by USEF's rules in operating their respective horse shows. Furthermore, under the January 2005 rule changes, the Promoter Defendants will not have "unfettered discretion" to waive the Mileage Rule because USEF "shall determine whether it is in the best interest of the sport to either deny or grant the waiver and under what terms and conditions such waiver shall be given." (Doc. No. 344, Exh. A, GR213). Therefore, applying the rule of reason, the Court finds that under the facts of this case the Mileage Rule does not result in an unreasonable restraint of trade.

4. Section 2 of the Sherman Act, 15 U.S.C. § 2 (Counts II—IV)

*17 Section 2 of the Sherman Act is directed against "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." 15 U.S.C. § 2. Broadly speaking, there are three distinct violations actionable under section 2 of the Sherman Act: (1) monopolization; (2) attempt to monopolize; and (3) conspiracy to monopolize. In their Third Amended Complaint, Plaintiffs allege all three violations.

As an initial matter under the Court's section 2 analysis, USEF argues that it is entitled to summary judgment on Counts II—IV, as well as the related Florida state law claims (Counts VI, VII, VII, and IX (in part)), since it is not a competitor in the relevant market and because Plaintiffs' "shared monopoly" theory is unsupported by the facts and law. This Court agrees that USEF is not a competitor in the Relevant Market. According to Plaintiffs, the Relevant Market is A-Rated Shows in the state of Florida during the winter months. It is undisputed that USEF is the NGB for equestrian sport in the United States and not a horse show promoter, operator or manager in this alleged market (Doc. No. 289, Long Decl., ¶ 17). Nor is there any credible evidence in the record that the Promoter Defendants control or influence USEF. Since USEF does not compete in the Relevant Market, USEF is entitled to summary judgment on Plaintiffs' section 2 claims based upon the argument that it does not compete in the Relevant Market. *See Aquatherm Industries, Inc. v. Florida Power & Light Company,* 145 F.3d 1258, 1261 (11th Cir.1998); *see also Spanish Broadcasting System,* 376 F.3d at 1075. The Court will address Plaintiffs' "shared monopoly" theory of liability in greater detail below.

Plaintiffs claim that Defendants have used USEF's protected status as a NGB to "create a series of monopolies" in the Relevant Product Market. The Court finds that

Plaintiffs have failed to present evidentiary support for the elements of their claims for monopolization offenses under section 2 of the Sherman Act.

i. Monopolization (Count II)

To establish a claim for monopolization, plaintiffs must demonstrate that Defendants: (1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power, as distinguished from growth or development as consequence of superior product, business, acumen, or historic accident. *See Morris Communications Corp. v. PGA Tours, Inc.*, 364 F.3d 1288, 1293-94 (11th Cir.2004)(citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)). "Monopoly power" is defined as "the power to control prices or exclude competition in the relevant market." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956).

Under a "shared monopoly" theory, Plaintiffs have alleged Defendants possess market power. Specifically, with respect to their monopolization claim under section 2 of the Sherman Act, Plaintiffs allege that "[t]he Federation, together with the non-Federation Defendants and/or other unnamed coconspirators, possess monopoly power in the Relevant Market due to their control over available dates for Recognized Horse Shows under the Federation Rules." Third Am. Compl. ¶ 220. The record evidence does not demonstrate that any individual Defendant had the power to control prices or exclude competition from the market. Rather, at most, the Promoter Defendants possess what Plaintiffs have termed a "perfect and permanent serial" monopoly. This is not sufficient to establish a claim for monopolization under section 2 of the Sherman Act.

*18 The Eleventh Circuit has not directly addressed whether claims based on a "shared monopoly" may consti-

tute a violation of section 2 of the Sherman Act. In October 2003, in denying the then Defendants'[22] motions to dismiss Plaintiffs' amended complaint, this Court found that "the concept of a 'shared monopoly' cannot be excluded at this juncture" (Doc. No. 59). At the summary judgment stage, however, the Court declines to accept the concept of a shared monopoly as a basis for section 2 liability under Plaintiffs' claims for monopolization and attempted monopolization. Only section 2's conspiracy to monopolize claim targets concerted action. *See Carpet Group, Int'l v. Oriental Rug Importers Ass'n,* 256 F.Supp.2d 249, 283-85 (D.N.J.2003); *see also ID Security Systems, Inc. v. Checkpoint Systems, Inc.,* 249 F.Supp.2d 622, 649 (E.D.Pa.2003).

Even if this Court were to accept the concept of a shared monopoly, Plaintiffs have failed to set forth facts sufficient to establish that USEF and the Promoter Defendants share monopoly power in the Relevant Market. Here we have a small Relevant Market, i.e., the state of Florida, in which numerous entities promote anywhere from 26 to 31 A-Rated Shows during the approximately seventeen (17) weeks that make up the winter months. There is no evidence before this Court that any of the individual Promoter Defendants expanded or combined their limited "perfect and permanent serial" monopolies to achieve market power in the Relevant Market.

ii. Attempted Monopolization (Count III)

To establish a claim for attempted monopolization, plaintiffs must demonstrate: "(1) that the defendant has

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[22] David E. Burton, Sr., David E. Burton, Jr., Burtons and Sons, Inc., Littlewood Fences, Inc., Kernan Hodges, USA Equestrian, Inc., Bob Bell, Classic Company, Ltd. and North Florida Hunter & Jumper Association, Inc.

engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 456, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993). "Anticompetitive conduct is 'the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor." ' *Convad Communications Co. v. Bellsouth Corp.,* 299 F.3d 1272, 1283 (11th Cir.2002), *vacated on other grounds,* 540 U.S. 1147, 124 S.Ct. 1143, 157 L.Ed.2d 1040 (2004),(quoting *United States v. Griffith,* 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1848)). "Proof of the intent element requires proof of 'a specific intent to destroy competition or build a monopoly." ' *See Retina Associates,* 105 F.3d at 1385 (quoting *Times- Picayune Publishing Co. v. United States,* 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953)). Plaintiffs allege that Promoter Defendants together have prevented competition from new Recognized Competitions because entities who submit timely applications to hold Recognized Competitions, accompanied by the applicable fees, do not have the same access to dates for Recognized Competitions as existing promoters and managers. The Court declines to accept the concept of a shared monopoly as a basis for section 2 liability under Plaintiffs' claim for attempted monopolization. Furthermore, Plaintiffs have failed to demonstrate that the Promoter Defendants engaged in predatory or anticompetitive conduct when they unilaterally refused to grant Plaintiffs' waiver requests. There is also insufficient evidence from which a jury could find that any of the Promoter Defendants acted with a "specific intent to monopolize" when they unilaterally opted to adhere to the USEF rules. Lastly, Plaintiffs do not point to any record evidence supporting an inference that the Promoter Defendants' unilateral conduct created a "dangerous probability" that they would succeed in achieving a monopoly.

iii. Conspiracy to Monopolize (Count IV)

***19** To establish a claim for conspiracy to monopolize, plaintiffs must prove "(1) concerted action deliberately entered into with the specific intent of achieving a monopoly; and (2) the commission of at least one act in furtherance of the conspiracy." *Moecker,* 144 F.Supp.2d. at 1310 (quoting *Todorov,* 921 F.2d at 1460 n. 5). *See also* ABA Section of Antitrust Law, Antitrust Law Developments, p. 308 (5th ed.2002); *Thompson v. Metropolitan Multi-List,* 934 F.2d 1566, 1582 (11th Cir.1991). A claim for conspiracy to monopolize does not require a showing of monopoly power. *See Levine,* 72 F.3d at 1555.

Since the most Plaintiffs can establish is that an individual promoter may have a "serial monopoly" for its protected dates, which make up only a portion of the total number of dates available for A-Rated Shows in the Relevant Market, no jury could find that an individual promoter acted with a specific intent to monopolize the Relevant Market. *See Feldman v. Jackson Mem'l Hosp.,* 571 F.Supp. 1000, 1010—11 (S.D.Fla.1983). Furthermore, as discussed above in relation to section 1, the evidence before this Court does not demonstrate that the Promoter Defendants acted in knowing concert or "conspired" when they individually refused to grant the Plaintiffs' requested waivers of the Mileage Rule.

5. Florida Antitrust Act, Fla. Stat. § § 542.18 and 542.19 (Counts V— VIII)

The Florida Antitrust Act provides that "[e]very contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." Fla. Stat. § 542.18 (2002). Furthermore, "[i]t is unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce in this state." Flat. Stat. § 542.19 (2002). "Federal and Florida antitrust laws are analyzed

under the same rules and case law." *All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc.*, 135 F.3d 740, 745 n. 11 (11th Cir.1998). "[T]he Florida legislature has, in effect, adopted as the law of Florida the body of antitrust law developed by the federal courts under the Sherman Act. *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 427 So.2d 1028, 1032 (Fla. 2nd DCA 1984). Therefore, for the same reasons this Court has found no violation of the Federal antitrust laws, this Court finds that Plaintiffs have failed to establish the elements of a violation of Fla. Stat. § § 542.18 and 542.19.

6. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § § 501.201 et seq. (Count IX)

Count IX alleges violations of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). Fla. Stat. § 501.201 et seq. FDUTPA provides that unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. Fla. Stat. § 501.204(1). Subsection 501.203(3) provides that a violation of the Federal Trade Commission Act constitutes a violation of FDUTPA. The law also provides that in construing this provision, great weight should be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a)(1) of the Federal Trade Commission Act. Fla. Stat. § 501.20(2). Unquestionably, antitrust claims fall within § 5(a)(1) of the Federal Trade Commission Act. *See Indiana Fed'n of Dentists*, 476 U.S. at 454-55. Plaintiffs' FDUTPA claim is based on the same allegations as their antitrust claims.[23] Third Am. Compl. ¶ 262. Therefore, for the same

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[23] Plaintiffs concede that their FDUTPA claims "survive" or "fall" with their antitrust claims.

reasons this Court has found no violation of the Federal antitrust laws, this Court finds that Plaintiffs have failed to establish the elements of a violation of Fla. Stat. § 501.201 et seq.

IV. Conclusion

***20** The Court finds that under the facts of this case there are no grounds under which Plaintiffs are entitled to relief under the antitrust law. *See First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288—89, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968). Accordingly, it is ORDERED AND ADJUDGED that:

(1) Defendant United States Equestrian Federation, Inc.'s ("USEF") Motion for Summary Judgment (Doc. No. 287) is GRANTED. USEF's Request for Oral Argument is DENIED.

(2) Defendants', David E. Burton, Sr., David E. Burton, Jr., Burtons and Sons, Inc. and Littlewood Fences, Inc. (collectively, "the Burton Defendants"), Motion for Summary Judgment is (Doc. No. 290) is GRANTED.

(3) Defendants', Thomas Struzzieri ("Struzzieri"), Horse Shows in the Sun, Inc. ("HITS") and Rose View Stables, Ltd. ("Rose View Stables")(collectively "the HITS Defendants"), Motion for Summary Judgment (Doc. No. 292) is GRANTED.

(4) Defendants', Stadium Jumping, Inc. ("Stadium Jumping") and Eugene R. Mische ("Mische)(collectively, "the Stadium Jumping Defendants"), Motion for Entry of Final Summary Judgment (Doc. No. 294) is GRANTED.

Defendants', Stadium Jumping, Inc. ("Stadium Jumping") and Eugene R. Mische ("Mische)(collectively, "the Stadium Jumping Defendants"), Request for Oral

Argument (Doc. No. 295) is DENIED.

(5) Since the Court has found Plaintiffs' claims are barred by the Defendants' implied immunity, all claims against Defendants Linda S. Aldrich and Fox Lea Farms, Inc. shall be dismissed.

(6) The Pretrial Conference in the above-captioned matter which was previously scheduled for Friday, May 13, 2005, at 8:30 a.m. is hereby cancelled.

(7) The Clerk is directed to enter judgment in favor of Defendants United States Equestrian Federation, Inc., David E. Burton, Sr., David E. Burton, Jr., Burton and Sons, Inc., Littlewood Fences, Inc., Thomas Struzzieri, Horse Shows in the Sun, Inc., Rose View Stables, Ltd., Stadium Jumping, Inc. and Eugene R. Mische and CLOSE this case.

DONE AND ORDERED